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SPECIFIC PERFORMANCE AND LAESIO FIDEI.

WHEN St. Paul in writing his first letter to the Christians at Corinth insisted that they should settle their own disputes by reference to a domestic forum and abstain from going to law before the heathen, he was helping to lay the foundations of a great system of jurisprudence. If we follow the authorized version and Dr. Stanley, St. Paul thought that the least esteemed members of the Church were fit for such business. But when we think of some episcopal chancellors whom we have known, we feel great relief in the revised version; for this makes the setting of the least valued members of the Church to this business an additional matter of reproach in St. Paul's mouth. However this may be, we here for the first time, so far as I know, catch a glimpse of the internal jurisdiction of the Church which was destined to grow into the great system ruled over by the Corpus juris canonici.

In the second Book of the Apostolical Constitutions (whatever its date and authorship) we get another glimpse of the Church Courts as then existing. From this we can to some extent figure to ourselves the manner of conducting the business, which was half hortatory and half judicial; we can gather some light on the penalties by which the judgments were enforced; but we find little or nothing definite with regard to the subjects of jurisdiction.

In Pliny's celebrated letter to Trajan, we have the first trace that I have been able to discover of the subject-matters of which the Church Courts would take cognizance. The Christians, according to the report of those who had abjured their faith, bound themselves by an oath not to commit theft, robbery, or adultery; not to break their word ('ne fidem fallerent'), and not to deny the existence of a deposit when called upon by the depositor (Plin. Epist., lib. x. ep. 97). 'Ne fidem fallerent.' Consider what a wide area

of moral obligation is covered by that pledge, and how ample would be the jurisdiction of the Court of the Christians if it undertook to enforce it. In those few words we may I suspect find the germ of many things with which we are more or less familiar: of the troth which man and woman still pledge to one another in the marriage service; of the habit of shaking hands over a bargain; of the oath on the faith of a Christian—which played so large a part in the discussions on the admission of Jews to Parliament; of the affidavit; of 'ma foi' as a common exclamation in the mouths of our French neighbours; and of the whole jurisdiction asserted by the ecclesiastical Courts based on fidei laesio, or breach of faith. This applied to Contracts is, I suggest, the origin of the jurisdiction in specific performance.

If every breach of faith was cognizable in the Church, it would follow that to pledge the faith was to create an obligation cognizable in the spiritual Courts and enforceable by penitence or excommunication; and accordingly we find in the middle ages that the pledge of faith (fidei interpositio—fides facta) was a common sanction to engagements of various descriptions.

(*a*) First may be mentioned that solemn contract in which it still survives, the contract of marriage. This contract was, as is well known, in the eye of the Church and down to the Tridentine Decrees a purely consensual one; but whether contracted per verba de futuro or de presenti it was often accompanied by the solemnity of an oath or of the fidei interpositio. The chapter of Gregory's Decretals De Sponsalibus bears abundant evidence of this practice; and of that which is important for my point of view, that the Church by its admonitions enforced on those who had pledged their faith to one another the actual performance of their promise. 'Hi qui de matrimonio contrahendo pure et sine omni conditione fidem dederunt, commonendi sunt et omnibus modis inducendi ut praestitam fidem observent' (Decr. Greg., lib. iv. cap. ii).

Curiously enough, it appears in our land laws in connection with maritagium, or land settled, to use a modern phrase, on a woman's marriage; and in this connection it appears in two ways. In the first place, if land was given as maritagium servitio obnoxium, the husband and the heirs of the woman were bound to do service to the lord but without homage till the third heir. But the woman and her heirs rendered fidelity to the lord 'sub fidei vel sacramenti interpositione' in nearly the same words as homage was rendered (Glanville, lib. vii. cap. 18).

Again, we shall by and by observe that even when faith was pledged, the common law did not permit that a lay fee should be sued for in the ecclesiastical Courts. But to this principle an

exception was allowed, according to Glanville, in the case of land given in marriage—maritagium. If the woman on whose marriage the land was given or her heir sought to recover the land from a stranger, she or he must sue in the lay Court; but if she or he sought to recover it from the donor or his heir, then the suit might at the plaintiff's election be brought in the lay Court or in the Court Christian—this Court having jurisdiction 'propter mutuam affidationem quae fieri solet quando aliquis promittit se ducturum in uxorem aliquam mulierem, et ei maritagium promittitur ex parte mulieris.' And with this jurisdiction the King's Court would not interfere, 'licet de laico feodo sit' (Glanville, lib. vii. cap. 18).

(*b*) The pledge of faith appears to have been abundantly used in private bargains; contracts of partnership seem to have been made under its sanction (Decr. iv. cap. ii); it was used to give solemnity to bargains about land; and it was sometimes the only thing on which a creditor could rely to prove his debt against his debtor, in which case we shall see it went hardly with the creditor in our English Courts. In short, I suppose that ecclesiastics, claiming as they did jurisdiction over contracts of whatever nature when covered by the sanction of an oath or of the fidei interpositio, encouraged the giving and taking of these forms of security.

(*c*) This pledge of faith occurs in the matter of essoins which occupied an important place in our old jurisprudence. If the person summoned could not come, he was bound to send someone—an essoiner—to make his excuse: and this essoiner, at least if of humble station, was bound to pledge his faith that he would produce the person, whose absence he excused, at the proper time to make his excuse in person and justify by oath the essoiner's statement (Bracton, Com. lib. v. Tract. ii. cap. 2). In the recent volume of Pleas in Manorial Courts issued by the Selden Society (p. 6) occur several entries of this pledge of faith by essoiners in a Manor Court A. D. 1246.

(*d*) Again, it found its way into the practice of our Exchequer, as appears from the Dialogus de Scaccario (ii. 19 et seq.). In the case of a tenant in capite of the Crown, an indulgence in payment might be obtained on his pledging his faith in his own person or by the hand of his steward (oeconomicus) to pay on the taking of the sheriff's account in the Exchequer. This pledge appears to have been given by the tenant in capite or his steward placing his hand in that of the sheriff and in the presence of all the suitors in the County Court. If a lord made default, he was detained at the Exchequer so long as it sat; and here again he had to pledge his faith, but this time to the marshall—'fide data in manu mareschalli'—not to go beyond a league from the town without leave of the barons: if default continued, the lord was detained 'sub libera custodia,' but

a soldier or a steward might be committed to prison 'pro fide laesa.'

(*e*) But again, it was made use of in cases of obligations of a more public or political character. Edward the Confessor, according to William the Norman, had promised to him (William) the succession to the throne of England, 'interposita fide sua' (Eadmer, Hist. p. 7, Rolls Series): William Rufus, fearing that Lanfranc would refuse to consecrate him, promised to Lanfranc, both by himself and all whom he could get to join him, and that as well by oath as by faith (fide sacramentoque), that he would observe justice, mercy, and equity (Id. p. 257): William of Ely, the unpopular chancellor of John's reign, 'who plaied Rex in the King's absence' (Fuller, Church Hist. cent. xii. sect. 2), pledged himself to the surrender of certain castles by his own promise and by the pledged faith of some of his followers (3 Roger de Hoveden, 145, Rolls Series); and lastly, Henry III pledged himself 'fide et juramentis' not to recall certain grants which he had made, a pledge from which he was released by Gregory IX (Royal and Hist. Letters, iii. App. p. 551).

In the early German laws, the fides facta played an important part: it appears to have been specially employed as the formal contract of betrothal (Sohm, Eheschliessung, p. 34), and to it a whole chapter of the Salic law is devoted. Here the fidei laesio seems to have been a subject of lay jurisdiction. But I have neither sufficient learning nor present inclination to discuss this German aspect of the question, nor to enquire whether the fides facta of the Teutonic laws can or cannot be traced back to an origin in the Christian Church.

Faith was I suppose pledged by such words as these, 'Thereto I plight thee my troth,' or 'Thereto I give thee my troth,' or 'accipe fidem meam' (Sohm, p. 49, n. 53). It was often evidenced by the giving and taking of the hand, as in the wedding service, and as in the proceedings in the Exchequer to which I have referred (see also Sohm, p. 48): it was plighted sometimes by the principal party alone, sometimes by his nominee or agent, sometimes by himself and others as his co-pledges: sometimes people were called in as witnesses ('et ad id faciendum affidavit coram viris prudentibus et discretis ad hoc vocatis;' Royal Letters, iii. p. 308), or the act was done before some well-known assembly, as the County Court. The plighted faith was not an oath: sometimes it was the alternative for an oath: sometimes the oath and the plighted faith were both given. But so closely did the two things get together in practice that the word which the mediæval writers use to describe that a man had plighted his faith —affidavit—we use to describe the fact that a man has sworn.

In England, with the single exception of the proceedings in the Exchequer to which I have referred, I cannot find that any lay Court took any cognizance of a fidei laesio, whilst the Canon Law seems to have claimed a general jurisdiction in all cases of the breach of an oath or of the plighted faith,—a jurisdiction I suppose enforceable by admonition and penance, and in default of obedience by excommunication. Accordingly we find the clergy of Normandy, in articles passed by them in 1190 and assented to by Richard, asserting a general jurisdiction in breaches of faith and violations of oaths: 'generaliter omnes de fidei laesione, vel juramenti transgressione quaestiones in ecclesiastico foro tractabuntur' (2 Ralph de Dicito, p. 80, Rolls Series; 2 Matt. Paris, p. 368, Rolls Series); and in like manner in England we find that the Courts Christian asserted a general jurisdiction in all such cases. If it had been allowed it is evident that they would have acquired a firm hold on almost all the ordinary affairs of life, whenever in fact there was a contract or dealing in which the faith could be pledged or an oath taken.

In Bracton's time (Com. lib. v. cap. 9) the ecclesiastical Courts appear to have claimed jurisdiction in matters of contract in three cases: (1) when one of the parties was a clerk; (2) when an oath had been taken; and (3) when there was the fidei interpositio. But in all these cases the lay Courts prohibited if the subject-matter of the contract was of secular and lay cognizance. Glanville puts the relation of the ecclesiastical and lay Courts in this matter of the plighted faith very clearly (book x. cap. 12): 'Die autem statutâ, debitore apparente in curiâ, creditor ipse si non habeat inde vadium nec plegios nec aliam diracionationem nisi solam fidem, nulla est haec probatio in curia Domini Regis. Verumtamen de fidei lesione vel transgressione inde agi poterit in curia Christianitatis. Sed judex ipse ecclesiasticus, licet super crimine tali possit cognoscere et convicto poenitentiam vel satisfactionem injungere: placita tamen de debitis laicorum vel de tenementis in curia Christianitatis per assisam regni, ratione fidei interpositae, tractare vel terminare non potest.'

To the like effect too is the 16th chapter of the Constitutions of Clarendon: 'Placita de debitis quae fide interposita debentur vel absque interpositione fidei sint in justitia regis.' To the like effect are records of John's reign (Abbrev. Placit. vol. 21. p. 31) and Edw. III. (Lib. Assis. fol. 61. pl. 70, 22 Edw. III).

The struggle was long continued; 'The Spiritual Courts,' says Blackstone (iv. 53), 'continued to grasp at the same authority as before in suits pro laesione fidei, so late as the fifteenth century.' The two versions of the great statute Circumspecte agatis, the one

saving to the Courts Christian jurisdiction in such actions, and the other denying it to them, are evidence of the zeal with which the contest was carried on: for the true text must almost certainly have been tampered with and falsified by the one party or the other, in order to support its contention.

In Bracton's note-book, so admirably edited by Prof. Maitland, two cases illustrative of the claim of jurisdiction on the ground of fidei laesio are particularly instructive.

The first (No. 50) occurred in the year 1219. A prohibition had issued to restrain Alice Hathemus from drawing Roger the son of Ade into the Court Christian in regard to a lay fee. Alice replied that the matter between her and Roger in the Court Christian was 'de fide sua lesa et non de laico feodo;' that after her husband's death she had pledged part of her dower to Roger for a term of ten years, and that he had pledged his faith (affidavit) to return the land to her at the end of the ten years: that the term had passed but he had not returned the land, and therefore she sued him 'de lesione fidei.' But Alice was restrained, and the marginal note runs, 'Nota quod prohibicio locum tenet de fidei lesione propter laicum feodum.'

The second case (No. 1893) occurred in the year 1227. It was an assize to determine whether William the son of Godwin unjustly disseized Richard the son of Maria de Brom of a tenement in Acle.

The jurors found that Alured Rowe demised the land to Richard the son of Maria for a term: meanwhile William the son of Godwin met with Alured and they arranged that Alured should demise the land to William (in feodum) for a certain sum of money, and the day was fixed for the payment of the money and the execution of the charter, and they pledged their faith to this contract ('et ad convencionem istam tenendam hinc inde fuit affidatum'). When the day came William broke his bargain, and thereupon Alured demised the land to Richard. Subsequently, William impleaded Alured in the Court Christian for breach of faith (de fidei lesione). Ultimately, Alured was compelled to execute the deed and to demise the land to William ('ita quod oportuit eundem Aluredum de necessitate facere ei cartam suam et terram illam ei concedere'). Thereupon came William and disseized Richard of the land. Richard (as was just) was held entitled to recover seizin of the land and William was in mercy.

This entry is of the last importance for my enquiry. It appears to be a clear case of a judgment for specific performance of a contract pronounced by the Ecclesiastical Court.

At later dates I find one or two scattered traces of an exercise of a jurisdiction in respect of contracts by the Ecclesiastical Courts.

Chaucer in some well-known lines in the Friar's Tale mentions contracts as a subject-matter of the jurisdiction of the archdeacon.

> 'That boldely did execucioun
> In punischying of fornicacioun,
> Of wicchecraft, and eek of bauderye,
> Of diffamacioun and avoutrye,
> Of chirche-reeves and of testamentes,
> Of contracts, and of lak of sacramentes.'

Again in the Registrum Brevium (1634), p. 66 *a*, is found a form of writ de excommunicato deliberando, where the excommunication appears to have been pronounced 'ratione contractus in civitate nostra habiti.'

There is therefore clear evidence of the activity of the Courts Christian in matters of contract. But there is another point to be noted: their proceedings were by admonition on the delinquent party to do the very thing undertaken; on the man who had married a woman and refused her the rights of matrimony to take her home; on the man who refused to execute the deed according to his promise to execute the deed. A general principle of the Canon law was expressed in the heading of one of its chapters, 'Judex debet studiose agere ut promissa adimpleantur,' and in the sentence therein contained, 'Studiose agendum est ut ea quae promittuntur opere compleantur' (Decr. Greg. IX. lib. i. tit. 36. cap. 3).

The conclusion at which I incline to arrive from these materials is that from a very early date the Courts Christian enforced the specific carrying into execution of contracts in which there was an oath or fidei interpositio: that this jurisdiction was narrowed and perhaps almost extinguished by the pressure of the writ of prohibition from the King's Court: and that the ecclesiastical Chancellors found in the Chancery a means of reviving a like jurisdiction, the writ of subpœna taking the place of excommunication.

EDW. FRY.

[As to the importance of 'fides' in early Roman jurisprudence, cf. Prof. Muirhead's note on Gaius iii. § 92, and his 'Historical Introduction to the Private Law of Rome,' pp. 22, 50, 164–5.—ED.]

UNE ECOLE DES SCIENCES POLITIQUES.

DE tout temps la politique a été considérée comme un art. Nul ne faisait difficulté de reconnaître que l'apprentissage de cet art se devait faire, comme pour celui du statuaire, dans la pratique même, qu'il fallait avoir longtemps pétri la glaise pour des œuvres de moindre importance avant d'être admis à tenter l'épreuve suprême du 'chef-d'œuvre,' et de conquérir le rang de maître. La notion d'une *Science* politique est relativement récente, et plus encore la répartition en plusieurs sciences dites politiques, imposée par la nécessité de la division du travail.

Comme toute science naissante, la science politique a eu, et a encore, à lutter pour se faire sa place au soleil ; ses destinées varient en chaque pays avec les mœurs, la tournure d'esprit nationale, les circonstances de fait.

L'avènement de la démocratie a profondément modifié les conditions de la vie politique et de l'accession aux charges publiques dans maint pays. Si les influences personnelles et le népotisme continuent de jouer un rôle officieux, il est admis en principe, officiellement, presque partout que c'est au mérite que doivent échoir les places: d'où la multiplicité des examens,—les concours employés comme moyen de sélection et par suite de recrutement.

Nous voudrions donner ici une idée de ce qui a été fait en France pour répondre aux nécessités nouvelles ; nous voudrions montrer la place qu'y a prise l'enseignement des sciences politiques,—dans quelles conditions s'est créé et développé cet enseignement,—dans quel esprit il est donné et quelle influence il a eue sur la vie politique de ce pays.

Quelques mots d'abord sur ce qui existe ailleurs dans le même ordre d'idées.

L'Allemagne a des cours de Sciences Politiques (Staatswissenschaften) dans les Facultés de Philosophie de ses Universités ; elle en a à Strasbourg dans la Faculté de Droit ; elle a des Facultés Camérales dans les Universités du sud. Les matériaux existent ; mais ils ne sont pas groupés et ordonnés de manière à former un type intégral d'instruction progressive. Selon l'esprit général de son organisation universitaire elle présente à l'étudiant tout ce qu'il lui faut comme sur une carte de restaurant, c'est à lui de dresser son menu et de régler les services du repas: c'est le régime de la liberté absolue, mais il a pour conséquence fâcheuse que l'étudiant est abandonné à

lui-même sans méthode et sans guide. Trop souvent aussi il est obligé d'émigrer d'une université à une autre pour compléter aux leçons de tel maître célèbre son éducation scientifique: après avoir suivi le cours de science financière de A. Wagner ou d'économie politique de G. Schmoller à Berlin, il ira chercher les leçons de Droit des Gens de H. Marquardsen à Erlangen, ou bien entendre Laband à Strasbourg, Schönberg à Tübingen, Nasse à Bonn.

Dans les Etats-Unis d'Amérique, un assez grand nombre d'écoles de Sciences Politiques ont été créées, toutes, croyons-nous, à l'imitation de celle de Paris, qui fait justement le sujet de cet article. C'est le cas de Columbia et de Johns Hopkins University. Ces établissements ont envoyé à plusieurs reprises des *graduates* ou des *lecturers* se former rue St. Guillaume [1].

En Angleterre aucun effort n'a encore été fait dans la voie où se sont engagés les pays que nous venons de citer. Il semble qu'en ce pays de la politique par excellence on dédaigne un peu l'étude philosophique de la politique: l'action a des attraits irrésistibles pour l'Anglo-Saxon et il a hâte de s'y jeter. Il ne croit pas nécessaire de se charger d'un bagage théorique bien lourd, il compte que l'expérience viendra d'elle-même au contact des hommes, au milieu des faits et, une fois engagé dans le mêlée, il n'a guère le goût ni le loisir de s'en abstraire et de philosopher. Sans aucun doute cette méthode tout empirique a eu la plus heureuse influence sur la formation des mœurs politiques anglaises; cette méthode a donné à l'Angleterre des hommes rompus aux affaires et même de grands hommes d'état. Mais, pour l'observateur impartial et passif, qui suit les agitations, les actions et les réactions, éléments constitutifs de la vie d'un peuple, il est clair qu'aujourd'hui une évolution inévitable s'accomplit en Angleterre, et il s'étonne un peu que dans la chaleur de la lutte on ait semblé jusqu'ici en méconnaître l'importance. La nouvelle loi électorale qui a été le signal de l'avènement de la démocratie a eu pour conséquence de changer presque complètement les conditions de recrutement du personnel politique. Ce que l'on peut appeler déjà l'*ancienne* éducation politique est devenu impossible. Nous ne verrons plus des hommes très jeunes, entrant au Parlement, associés presque tout de suite à l'administration ou au gouvernement, apprenant les affaires en les voyant faire et en les faisant. Les éphèbes ont dû faire place à des gens d'un âge plus mûr; et ce sont ceux-ci désormais qu'on associe au pouvoir; ils s'offenseraient de se voir préférer des jeunes gens. L'éducation des jeunes gens par une haute pratique ne se

[1] L'Ecole Libre des Sciences Politiques est située sur la rive gauche de la Seine, à portée du Quartier Latin.

fait plus ; il faut donc qu'ils y suppléent par de sérieuses études théoriques.

En France il faut remonter jusqu'à la Restauration pour voir des hommes très jeunes associés aux grandes affaires, comme le Duc de Broglie, M. de Rémusat, pour ne citer qu'eux. Il advenait aussi que, sans le prestige d'un grand nom, sans le secours d'une éducation dirigée de bonne heure vers la politique, sans le privilège d'une jeunesse passée au milieu d'une société d'élite et de l'atmosphère gouvernementale, des 'self-made men' arrivaient, ainsi que Thiers, de très bonne heure au pouvoir. La révolution de 1848 et le brusque avènement du suffrage universel détruisirent d'un coup ces vieilles mœurs parlementaires ; c'était l'ère démocratique qui commençait. Les serviteurs éprouvés du peuple pouvaient dès lors espérer seuls d'être admis à mettre la main aux affaires ; et puis les principes d'égalité absolue ayant définitivement triomphé, la conséquence logique devait être que tous les emplois seraient mis au concours et donnés aux plus méritants. Il fallait donc préparer par l'étude toute cette jeunesse, et c'est ce qui amena le fondateur de la République de 1848, Hippolyte Carnot, le père du président actuel, et d'autres, à fonder l'Ecole d'Administration. Cette école ne survécut pas au coup d'état du deux décembre.

Ce n'est qu'à l'aurore de la Troisième République, que nous voyons une nouvelle tentative de ce genre et cette fois couronnée de succès : en 1872 est fondée à Paris par M. Emile Boutmy *l'Ecole Libre des Sciences Politiques*. Cette école est *libre*, elle est l'œuvre d'un homme. Il peut paraître singulier que la France, où, en matière d'instruction publique, l'on est accoutumé à tout attendre du gouvernement, ait montré cette fois l'exemple de l'initiative privée à l'Angleterre elle-même. On s'en étonnera moins quand on connaîtra la genèse de l'œuvre.

C'est l'œuvre d'un homme, disions-nous, d'un homme qui a su s'entourer dès la première heure de collaborateurs éminents, comme MM. H. Taine, Paul Janet, Albert Sorel, Levasseur, P. Leroy-Beaulieu, Ed. Laboulaye, etc. Mais, puisqu'il est impossible de séparer l'œuvre de son auteur, nous trouverons dans les penchants intellectuels et les vues scientifiques de M. Boutmy l'explication de l'esprit dans lequel son entreprise a été conçue, de la méthode qui a présidé à son fonctionnement, des qualités qui ont assuré son succès.

M. Boutmy est un historien constitutionnel ; c'est un philosophe et un penseur. Il a toujours cherché l'esprit des choses. Il a écrit une Philosophie de l'Architecture dans la première période de sa vie d'études, avant de chercher le secret de ce monument aux agencements plus compliqués, aux proportions plus insaisissables que celles de n'importe quel temple ou palais de pierre ou de marbre, je veux

parler de la constitution d'un état et en particulier de celle de l'Angleterre [1].

Le monde Anglo-Saxon sollicita entre tous l'étude et les recherches de M. Boutmy. 'L'Angleterre a eu cette rare fortune d'être prise comme exemple, bien qu'à des degrés divers, par tous les peuples désireux de concilier la liberté politique avec le respect de la forme monarchique.' Etudier le développement des institutions et de la société politique en Angleterre, en dégager avec netteté l'esprit et la philosophie, c'était fournir aux politiques et aux penseurs matière aux réflexions les plus profitables sur l'histoire et les mœurs du peuple qui, mieux qu'aucun autre, a su faire preuve de sens politique et donner l'exemple de la transformation sage et progressive des mœurs et des institutions. Porter ensuite ses vues sur le rejeton américain de l'arbre Anglo-Saxon, c'était suivre la transplantation sous un autre ciel, dans un milieu nouveau de ces mœurs lentement élaborées; et rien ne pouvait être plus passionnant ni plus profitable que d'observer l'évolution de ces institutions sous le régime de la république démocratique.

On connaît les belles et lumineuses études de M. Boutmy; profondes, elles font penser; écrites dans une langue imagée et précise, elles sont un régal pour les délicats.

En aucun autre sujet la méthode historique ne pouvait s'imposer avec un caractère plus marqué de nécessité essentielle que dans ces études mêmes. M. Boutmy applique cette méthode avec un rare bonheur et une grande sûreté de main. Il rapporta de ses recherches le dédain des systèmes a priori, la conscience du danger qu'il y a à s'y abandonner, l'expérience du monde Anglo-Saxon où l'excès de logique n'a jamais fait commettre une faute et le désir de mettre la jeunesse française à la salutaire école des faits.

Il avait puisé dans les exemples tirés de l'Angleterre la foi dans l'initiative individuelle. Son premier soin, en fondant en 1872 l'Ecole libre des Sciences Politiques, fut de ne rien demander à l'Etat et de se promettre de ne rien devoir qu'à lui-même. Son but était de créer parmi les jeunes générations une élite digne de remplir les plus hauts emplois, et de fournir par l'enseignement donné à l'Ecole un couronnement naturel à toute éducation libérale. Sa méthode s'inspirait de cette idée que l'enseignement des sciences dites politiques doit être principalement historique; point de théories; point de constructions a priori du gouvernement idéal.

Aucun diplôme, aucun titre officiel n'est exigé pour être admis à

[1] Etudes de Droit Constitutionnel: France, Angleterre, Etats-Unis. 1 vol. Paris: Plon. 1885. 2me édit. 1888.—Le développement de la constitution et de la société politique en Angleterre. 1 vol. Paris: Plon. 1887.—Le gouvernement et la tutelle de l'Etat en Angleterre; deux thèses de Sir Henry S. Maine; l'Etat et l'Individu en Angleterre. Annales de l'Ecole libre des Sciences Politiques. 1886 et 1887.

suivre les cours. L'Ecole admet les étrangers, qui y sont nombreux ; elle crée ainsi entre les élèves français et étrangers des relations qui peuvent être très profitables, lorsque ces jeunes gens, parvenus à de hautes positions dans leurs pays respectifs, auront à traiter ensemble d'affaires d'Etat. L'Ecole contribue aussi dans une mesure considérable à faire connaître les pays étrangers en France ; à ce point de vue son rôle ne peut que grandir à mesure que de nouvelles générations passent sur ses bancs. Bien des erreurs, des préjugés funestes, sources de malentendus internationaux qui parfois arrivent à l'état aigu, sont ainsi dissipés.

Nous avons dit que l'enseignement de l'Ecole se proposait deux buts principaux : 1°. culture générale pour les jeunes gens qui s'occupent des diverses branches de la politique ; 2°. préparation aux services civils. En conséquence, cours et conférences sont distribués en cinq sections : I. Section administrative (préparation au Conseil d'Etat, à l'administration centrale et départementale, au contentieux des ministères, sous-préfectures, secrétariats-généraux de département, conseils de préfecture). II. Section diplomatique (préparation au Ministère des Affaires étrangères, légations et consulats). III. Section économique et financière (Ministère des Finances ; Inspection des finances ; Cours des Comptes). IV. Section Coloniale (Administration Centrale ; Directions de l'Intérieur ; administration des affaires indigènes ; emplois dans les grandes compagnies industrielles et financières). V. Section Générale—où l'enseignement a pour base le droit public et l'histoire et qui est une préparation toute naturelle à la vie publique. D'autre part le programme de l'Ecole comprend des éléments d'instruction supérieure, qui complètent utilement la préparation à certaines hautes positions commerciales (Banques, contentieux des grandes compagnies, inspection des chemins de fer, etc.).

A l'entrée de la plupart des carrières publiques en France se trouve un concours ; l'Ecole a rendu l'immense service de grouper des forces éparses, de relier des moyens de préparation à ces examens, jusque-là dispersés et peu accessibles,—sans parler de l'intensité plus grande de lumière scientifique qui est résultée de cette concentration de tous les rayons en un foyer unique.

Je m'explique : avant que l'école fût fondée le jeune homme, qui désirait se préparer à la carrière diplomatique ou au concours pour le Conseil d'Etat, pouvait s'adresser à quelques répétiteurs particuliers ('coaches') et travailler sous leur direction ; il pouvait aussi aller suivre quelques cours d'histoire à la Sorbonne et quelques cours de droit administratif à la faculté de droit. Mais en aucun cas ces cours n'avaient été institués à cet effet, et le candidat n'avait point de ce fait tous les moyens de préparation désirables. D'autre

part le prix élevé des répétiteurs particuliers ajoutait encore un obstacle. L'Etat, sous l'empire, s'était peu préoccupé de l'enseignement supérieur; et à aucun moment il n'était venu à la pensée des gouvernants d'alors de fonder une école d'administration ou des sciences politiques; il est à remarquer que c'est surtout depuis l'avènement de la République que le principe du concours a été admis comme base de recrutement des fonctions publiques; c'est donc depuis lors seulement que la nécessité d'une école de ce genre s'est particulièrement fait sentir. D'ailleurs il ne semble nullement regrettable que l'Etat n'ait pas pris l'initiative et qu'il ait laissé la tâche à des particuliers. Il paraît difficile qu'une école de ce genre, si elle est aux mains de l'Etat, si elle est soumise aux volontés gouvernementales, échappe aux influences purement politiques. Il eût été à craindre qu'une école officielle des sciences politiques ne devînt surtout une école de politique, et que la science pure n'en souffrît. Rien à craindre de ce genre dans le cas présent: l'école est indépendante et doit à son indépendance même de pouvoir maintenir son enseignement au-dessus des querelles de parti.

Le corps enseignant présente une réunion d'hommes éminents dont bon nombre sont connus du public anglais par leurs ouvrages ou leur carrière politique. M. Flourens, qui naguère encore était ministre des affaires étrangères, a été professeur de droit administratif à l'Ecole; M. Léon Say, membre de l'Institut, Sénateur, ancien ambassadeur de France à Londres, et qui y a conservé comme diplomate, comme économiste, comme homme du monde, bien des amitiés, faisait récemment à l'Ecole, dans le langage élégant, spirituel et éloquent qui lui est habituel, une série de conférences sur les 'Solutions démocratiques de la question des Impôts,' qui ont été réunies en deux volumes; M. Levasseur, membre de l'Institut, le savant économiste et statisticien, qui manque rarement les congrès scientifiques internationaux, professe à l'Ecole depuis dix-huit ans (statistique, commerce extérieur et géographie économique); M. Boutmy, le Directeur, et M. A. Ribot, l'éloquent et savant député, se partagent l'enseignement de l'Histoire Constitutionelle; on se rend compte de l'éclat qu'ils ont su donner à cet enseignement. Nous rencontrons un nom avantageusement connu du monde savant comme du monde politique, porté avec distinction par MM. Paul et Anatole Leroy-Beaulieu. M. Paul Leroy-Beaulieu, membre de l'Institut, professeur au Collège de France, la Directeur de 'l'Economiste Français,' dont on connaît les beaux ouvrages de science financière et sur la colonisation, traite des systèmes coloniaux des principaux états. Quant à M. Anatole Leroy-Beaulieu, récemment élu à l'Institut, dont on n'a pas oublié les nombreuses et profondes études sur la Russie publiées dans la Revue des Deux Mondes, et qui est resté un

des hôtes les plus assidus et les plus écoutés de la Revue, il fait, d'une voix mordante, en homme bien informé et en philosophe un peu sceptique, la vivante 'Histoire des principaux Etats de l'Europe pendant les douze dernières Années.' M. Albert Vandal, à qui nous devons diverses études fort attachantes d'histoire diplomatique, traite des affaires d'Orient depuis l'émancipation de la Grèce jusqu'aux évènements les plus récents de la péninsule balkanique. M. Albert Sorel, qui s'est placé aux premiers rangs des historiens contemporains, l'auteur d'un ouvrage capital (L'Europe et la Révolution) destiné à rester comme un monument définitif à côté des travaux non exempts de partialité de l'Allemand Von Sybel, fait avec le plus grand succès 'l'Histoire Diplomatique de l'Europe depuis 1789.'

Nous n'en finirions pas si nous voulions énumérer dans son intégralité le brillant état-major que M. Boutmy a su grouper autour de lui, tous collaborateurs entièrement devoués à son œuvre. Les exemples que nous avons donnés suffiront à expliquer l'éclatante réussite de l'entreprise.

Chaque cours dure soit deux ans, soit un an, soit six mois, ou même seulement un trimestre, selon l'objet. Les leçons durent une heure; elles sont relativement assez espacées; quelques cours très-importants comportent deux leçons par semaine, la grande majorité une seule. Cette mesure, adoptée par économie d'abord, a été reconnue excellente et maintenue. Les leçons d'exposition générale,—les seules que comportât ce système,—se sont à l'expérience montrées bien supérieures aux cours détaillés où le professeur se contente trop souvent de lire un manuel et auxquels invite trop d'espace. Le maître trace les grandes lignes, insiste sur quelques points particuliers pour marquer la méthode à suivre, puis laisse aux élèves le soin de compléter: il en résulte une heureuse incitation au travail personnel.

L'enseignement de l'Ecole dans les diverses sections présente cet important avantage de rapprocher des cours généraux—historiques et politiques—et des cours professionnels: les uns écartent la routine, les autres la vaine abstraction. Ainsi dans la section diplomatique M. Albert Sorel fait une leçon et une conférence par semaine: la leçon est solennelle en quelque sorte, elle porte sur l'histoire diplomatique dans ses grandes phases, elle prête à d'éloquents développements. La conférence a un caractère essentiellement professionnel; le maître y traite de tout ce qui touche au *métier* de diplomate: organisation des services; procédure d'une négociation; caractère des principales cours et des cabinets de l'Europe; étude des *sources* et critique des textes. Il s'y fait même des exercices pratiques: l'historique d'une négociation, la rédaction d'une note sur l'état d'une question à une époque donnée, etc.

Il serait fatigant d'énumérer les cours qui constituent le programme de chacune des cinq sections ; nous nous bornerons à donner comme exemple la section générale, destinée spécialement aux jeunes gens qui se préparent à la vie publique sans cependant aspirer à aucune fonction. Les matières obligatoires y sont les suivantes : Législation civile comparée.—Histoire constitutionnelle de la France, de l'Angleterre et des Etats-Unis.—Constitutions de la Belgique, de la Suisse, de l'Allemagne, de l'Autriche-Hongrie et de l'Italie.—Histoire parlementaire et législative depuis 1789.—Histoire diplomatique de 1789 à nos jours.—Tableau de l'Europe contemporaine et Affaires d'Orient. — Droit des Gens. — Economie Politique. — Finances.—Géographie et Ethnographie.—Anglais ou Allemand.—Puis les matières facultatives sont: Organisation administrative comparée.—Législation commerciale et maritime comparée.—Histoire des doctrines économiques.—Langue russe.

Le cycle des études s'accomplit en deux ans. Et s'il a été fait une distinction entre matières facultatives et obligatoires, c'est qu'au bout de ces deux ans les élèves sont admis à briguer un diplôme. Ce diplôme s'obtient en passant un examen sur les matières obligatoires de la section à laquelle l'élève a appartenu. Cet examen se compose d'épreuves orales et d'épreuves écrites. Les élèves qui aspirent au diplôme doivent présenter deux études développées sur de matières empruntées à deux cours différents ; ils choisissent le sujet de chacune de concert avec le professeur compétent. Ils ont à faire preuve de la sorte non seulement de mémoire, mais d'effort et de talent personnels. Il n'est pas rare que l'élève ait par la suite repris et publié sa thèse.

Il est à remarquer, et nous ne saurions trop y insister, que le diplôme de l'Ecole ne confère aucun droit, il n'a de valeur que par le prestige propre que l'Ecole a su acquérir ; il n'ouvre par lui-même aucune porte officielle. L'Ecole est une école privée, libre comme l'indique son titre, et ses élèves se présentent sur le pied d'égalité avec les autres candidats aux concours placés à l'entrée des fonctions publiques. Mais c'est dans le résultat pratique que s'est montrée l'excellence même de l'organisation de cette école. Dans les concours qui ouvrent l'accès des plus hautes fonctions de l'Etat, ses élèves arrivent toujours les premiers et même remportent presque toutes les places : ainsi pour le Conseil d'Etat, dans la période de 1877–1887, sur 60 candidats reçus 48 appartenaient à l'Ecole ;—pour l'Inspection des Finances, durant la même période, sur 42 candidats reçus, 39 sortaient de l'Ecole, et depuis 1880 tous les candidats reçus ont été préparés par l'Ecole ;—pour la Cour des Comptes, dans les quatre derniers concours, sur 17 places 16 ont été obtenues par les élèves de l'Ecole ;—pour la carrière diplomatique, aux

deux concours de 1886 et 1887, sur 26 candidats reçus, 20 appartenaient à l'Ecole.

Enfin, depuis dix-huit ans que l'Ecole a été fondée, près de trois-mille jeunes gens, après y avoir reçu une saine et fortifiante nourriture intellectuelle, ont été jetés, comme un levain, dans la masse nationale ou semés dans les fonctions publiques. De tels résultats ont une éloquence qui parle d'elle-même. L'influence de l'Ecole et de son enseignement se fait sentir profondément dans maintes branches de la vie publique et administrative, et plus les années avanceront, plus elle sera marquée, plus elle se manifestera claire et bienfaisante.

L'Ecole possède une bibliothèque peut-être unique en son genre, réunissant 15,000 volumes *spéciaux* de sciences politiques. Une salle de lecture y est annexée, alimentée par une centaine de revues et journaux français et étrangers. Les élèves ont ainsi sous la main de précieux instruments de travail et éléments d'information.

Malgré la date relativement récente de la fondation de l'Ecole, une tradition s'y est déjà formée et les générations des anciens continuent de s'intéresser aux travaux des nouveaux-venus. Les générations se succèdent en se donnant la main, s'entraidant: une société des élèves et anciens élèves a été formée à cet effet.—Sous la direction d'anciens élèves, des sortes de *debating societies* se sont constituées, où les élèves travaillent et discutent en commun soit leurs thèses de fin d'année, soit des questions à l'ordre du jour. Enfin, nombre d'anciens élèves entrés dans la politique active, dans le journalisme, dans la vie pratique, dans les fonctions publiques se réunissent périodiquement à l'école et y continuent leurs travaux sous la direction de quelques-uns de leurs maîtres: c'est ainsi que des groupes de travail ont été formés—l'un pour la science économique et financière, l'autre de droit public et privé, le troisième d'histoire diplomatique. Dans chacun de ces groupes les questions de politique pratique et actuelle sont posées et traitées à loisir; on y fait l'historique des questions résolues; on s'y livre à l'étude approfondie des institutions des divers peuples: un grand intérêt est porté aux études de législation comparée, qui y sont abordées non pas seulement au point de vue purement juridique, mais encore au point de vue réel de l'application et des effets constatés, et enfin de la leçon à tirer des faits mêmes.

Un recueil a été créé qui publie les plus importants de ces travaux, réunissant côte à côte ceux des maîtres et ceux des anciens élèves: les *Annales de l'Ecole des Sciences Politiques*[1] se sont déjà fait avantageusement apprécier du public. Elles reflètent heureusement l'activité intellectuelle déployée rue St. Guillaume. C'est une publica-

[1] Publiées à Paris chez F. Alcan, 108, Boul. St. Germain.

tion savante et bien vivante tout à la fois, où les questions sont traitées à fond et qui a rendu déjà de grands services en France pour faire connaître la vie et les institutions politiques des pays étrangers. Elle a publié, comme nous le disions plus haut, les belles études de M. Boutmy sur l'Angleterre, un travail sur la question de la séparation de l'Eglise et de l'Etat en Angleterre, résultat d'une longue enquête faite sur place; un autre sur les cédules immobilières de *l'income-tax* en Angleterre; une étude condensée et pénétrante de M. André Lebon sur les constitutions allemande et prussienne; des travaux sur le *Kulturkampf*, sur le régime parlementaire au Canada, les impôts en Italie, en Belgique, en Hollande; l'organisation des partis aux Etats-Unis . . . .

Quelques mots seulement suffiront sur la situation matérielle: l'Ecole a des ressources financières indépendantes, qui assurent son existence. Elle est soutenue d'ailleurs par les *fees* que paient les étudiants: la somme à verser pour être admis à suivre tous les cours pendant une année ne dépasse pas £12. Le nombre actuel des élèves approche de 400. L'Ecole qui s'était ouverte d'abord dans un local modeste, rue des Sts. Pères, a émigré au bout de quelques années rue St. Guillaume. Elle est devenue propriétaire d'un vieil hôtel aristocratique, situé aux confins de ce calme faubourg St. Germain, où les beaux et antiques bâtiments abondent. La prospérité venant, l'Ecole s'est agrandie et elle a maintenant une façade imposante sur la rue, tandis que la partie postérieure donne sur un beau jardin ombragé d'arbres séculaires. L'installation intérieure est parfaitement adéquate à l'objet proposé et de tous points confortable.

Il ne rentre pas dans mon sujet d'expliquer tout au long comment l'Ecole est administrée, dirigée. D'ailleurs telle méthode qui a réussi à Paris pourrait être impuissante ailleurs; il m'a suffi de montrer que l'Ecole avait atteint son but. Cependant je ne puis m'abstenir de faire remarquer que l'Ecole est toujours dirigée par son fondateur, qui depuis seize ans n'a cessé d'y consacrer tous ses instants, toutes ses pensées, qu'il a faite sa chose, son enfant, si je puis dire. C'est évidemment en grande partie à cette unité de direction sous la haute main d'un homme qui s'est révélé administrateur de premier ordre et admirablement organisé pour concilier tant d'intérêts divers; c'est à sa connaissance des hommes, à son habileté comme à son goût pour ce noble métier d'accoucheur d'esprits, que Socrate aimait tant et qu'il a baptisé,—qu'il faut attribuer le succès définitif dans cette délicate entreprise. Le Directeur est assisté dans ses fonctions administratives d'un *conseil d'administration*, dont font partie des hommes éminents comme MM. Hély d'Oissel; Alfred André, régent de la banque de France; E. Beaus-

sire. . . .—L'Ecole n'a pas été créée d'une pièce; elle s'est développée lentement, mais sûrement, comme une plante saine et vigoureuse qui croît sur un terrain favorable. Et encore a-t-il fallu diriger cette croissance, la surveiller, l'activer; évidemment M. Boutmy ne pouvait compter sur ses seules forces pour suffire à cette tâche; il y a été aidé par un *comité de perfectionnement*. Tandis que le premier conseil avait à décider des questions matérielles, financières, celui-ci étudiait les questions d'enseignement, la direction scientifique à imprimer à l'Ecole, statuait sur les transformations dans le programme, les améliorations à y introduire, les cours nouveaux à créer, les professeurs à choisir, à nommer. De l'organisation entière résulte une très grande souplesse. L'Ecole a une liberté absolue de choisir les hommes, de s'adapter aux besoins et aux circonstances, une entière autonomie : toutes garanties d'une activité féconde et d'une haute culture scientifique.

Je crois en avoir assez dit pour faire naître dans l'esprit du lecteur anglais la pensée de se poser cette question : N'y a-t-il pas en Angleterre un vide à remplir semblable à celui qu'a comblé en France l'Ecole Libre des Sciences Politiques ? Tout en tenant compte des différences de milieu, des habitudes particulières à chaque nation, des conditions spéciales de la vie politique dans chaque pays, n'y a-t-il pas à tirer du succès décisif de l'entreprise de M. Boutmy, et de créations analogues en Amérique, un encouragement, et une leçon peut-être, pour ceux qui pensent que le personnel politique et administratif ne peut que gagner en aptitude et en dignité professionnelles à se préparer à son métier comme font le *lawyer* et le médecin? Déjà les hommes compétents en Allemagne se sont posé la question; ils ont senti la nécessité de renoncer aux méthodes empiriques; il y a deux ans le 'Verein für Socialpolitik' publiait dans son volume annuel le résultat d'une consciencieuse enquête internationale.—Si cet article pouvait suggérer à quelques hommes énergiques, soucieux de maintenir et d'élever le niveau de la vie politique en Angleterre, l'idée de tenter une création analogue à l'Ecole française et qui pourrait s'en inspirer tout en demeurant originale, mon but aurait été atteint.

Il me semble d'ailleurs que, abstraction faite de ce qui distingue les deux pays, les mêmes raisons qui ont conduit à la fondation de l'école française se rencontrent également en Angleterre et les mêmes chances de réussite se laissent prévoir.

MAX LECLERC.

[It seems to me that the History Schools of our Universities afford the most likely starting-point for an English development in the direction indicated. Some good work of the kind has already been done in and through them.—ED.]

POSSESSION FOR YEAR AND DAY.

THE respect paid by medieval law, French and German, to a possession which has been continued without interruption for year and day has become the centre of a considerable mass of learning and of theories. Here it will be sufficient to refer to two main doctrines[1]. On the one hand it has been asserted that the law of the German tribes which overwhelmed the Roman Empire knew an annual usucapio for land, admitted that the ownership of land could be acquired by peaceful seisin for year and day, with perhaps some saving for the rights of those who were under disability. 'At the time when the Salian Franks invaded Gaul they still admitted that a possession prolonged for year and day would suffice to give ownership[2].' When French law becomes articulate in the twelfth and thirteenth centuries this brief prescription has perished; but it has left many traces of itself. In the twelfth century there are many towns in which possession, or at all events titled possession, for year and day will still bar all adverse claims. A little later we find that according to a very general custom the French possessory remedy, the plaint of novel disseisin (for this term is as well known in France as in England) will only serve to protect a possession that has endured for year and day; possession for year and day will no longer give ownership, but it is required for that seisin which the law protects; a shorter possession if protected at all is only protected by remedies which have their origin in Roman or Canon Law.

There is no need to point out how interesting this theory is that the Germans, or at all events the Franks, started with an annual prescription. Any supposition of their having borrowed it from the ancient Roman usucapio might for several reasons be dismissed, and we should seemingly be brought face to face with a striking similarity between the earliest stages of the two great bodies of law that have ruled the modern world.

On the other hand this theory has been strenuously denied. The barbarians knew no prescription. In course of time they borrowed from Roman Law the prescriptive terms of ten, twenty, thirty years; but it is in another quarter that we must look for

[1] Among the books which deal with the matter are the following:—Alauzet, Histoire de la Possession en droit Français: Esquirou de Parieu, Études sur les Actions Possessoires; Viollet, Établissements de Saint Louis, i. 110; Viollet, Précis de l'Histoire du Droit Français, 484; Bruns, Recht des Besitzes, 352-367; Albrecht, Die Gewere; Laband, Die Vermögensrechtlichen Klagen; Heusler, Die Gewere; Heusler, Institutionen des Deutschen Privatrechts, i. 56, ii. 66-117.

[2] Viollet, Précis, p. 484.

the origin of that respect for year and day which was prevalent during the later middle ages. To explain this it is necessary to say that the German conveyance of the later middle ages was an 'Auflassung,' or 'surrender' effected in Court, a proceeding closely analogous to our own 'fine of lands.' The person who obtained land under such a conveyance was there as here protected after he had quietly possessed the land for year and day. In some customs the protection amounted, as with us, to an extinction of all adverse claims, though there as here there was a saving for the rights of those who were under disability. In other customs after year and day the possessor, though not absolutely safe, had the enormous procedural advantage of being allowed to establish his title by his own oath without oath-helpers. The 'Auflassung' seems even to have become the one and only means of conveying land, and the fiction of litigation having gradually dropped away it gave to Germany a system of registered titles such as we shall never obtain without stringent legislation.

Now this in Germany is the most important context of 'year and day'; there is no trace of any such general rule as that possession for year and day will give ownership, or that possession not yet continued for that period is unprotected. It takes the action of a court of law to set this term running; the person in whose favour the 'Auflassung' is made is put in seisin by the officer of the court and the peace of the court is solemnly conferred upon him and his possession.

That the requirement of litigious proceedings for the purpose of passing the ownership of land was not primitive, seems quite certain. It has been traced to two main causes. In the first place the rights of expectant heirs had to be precluded. Our own classical common law seems to stand alone among the sister systems as regards what may be called its individualism, its refusal to admit that the family has rights, its assertion that the house-father's land is just his land and that he may do what he likes with it, that he may bequeath all his moveables to a stranger and leave his children penniless, that there is no community of goods between him and his wife. Practically similar results may have been obtained in all countries at least so far as the richer classes were concerned; but what in England was done by means of private settlements, by estates tail, remainders and so forth, was done elsewhere by general rules of law forbidding a man to alienate his land without the consent of his expectant heirs or enabling members of his family to compel a purchaser to resell the land at the price given for it. To get rid of these family rights one needs litigation real or pretended. Then in the second

place it seems that in Germany the lords of jurisdiction were more thoroughly successful than they were in England in the endeavour to establish the rule that land within their jurisdiction could not be alienated without their leave, and this even when (to take a distinction which hardly appears in England) they were not lords of the land but merely lords of the jurisdiction. These two causes converted the safest mode of conveyance, an 'Auflassung' before the court, into the only mode of conveyance. In England their power was less and, perhaps unfortunately, the extra-judicial feoffment lived on by the side of the judicial fine; but let us notice that during the middle ages one very great mass of English landholders conveyed their lands in court by surrender into the hands of the lord of the court; now the German for 'surrender' is 'Auflassung[1].'

The phrase invariably used to describe the space of time which has legal results seems to point to an origin in judicial proceedings. It is not a year but 'year and day,' 'an et jour,' 'Jahr und Tag.' Now in German books this is glossed as meaning one year, six weeks and three days. Various explanations have been given of this, but all seem to point to the fact that the 'day' is a 'court day.' One of the best accredited explanations is that the court is adjourned from six weeks to six weeks and that it sits for three days; the claimant is bound to make his claim at latest at the next session after the lapse of the year; thus as a maximum term he has a year, six weeks and three days[2]. Be this as it may, it is in connexion with judicial proceedings that we first hear of year and day; in particular when a defendant in an action of land will not appear the land is seized into the king's hands, and if the contumacy continues for year and day the land is then adjudged to the plaintiff; during the year and day it lies under the king's ban[3]. Now the suggestion is that in this contumacial procedure men saw the possibility of stable and effectual conveyances:—let the purchaser sue the vendor, let the land lie in the king's ban for year and day, then let it be adjudged to the purchaser, let him be put in seisin under the king's peace. According to this theory the

[1] Dr. Brunner, Zur Rechtsgeschichte der Römischen und Germanischen Urkunde, p. 286, has drawn attention to the importance of our fines and recoveries in the general history of law. Much that is interesting about the 'Auflassung' will be found in Bewer, Sala. Traditio, Vestitura.

[2] Heusler, Institutionen, i. 57. In Leg. Will. Conq. i. 3, we have a period of month and day given. It will be remembered also that a defendant summoned to the king's court had to be waited for during three days—per tres dies expectabitur, Glanv. lib. 1. cap. 7. Already in the thirteenth century the prolonged sittings of our King's courts must have made the original meaning of the additional day unintelligible.

[3] In England the land remained in the king's hand for but fifteen days; Glanv. lib. 1. cap. 7.

reverence paid in the later middle ages to possession prolonged for year and day has its root not in a primitive usucapio, but in the king's ban.

And now let us turn to England and ask whether we have any evidence which bears upon these conflicting theories.

In the first place we have some negative evidence. In all the dooms and land books that come to us from the time before the Norman Conquest there is I believe not only no mention of year and day, but no proof of any limitation or prescription [1]. It seems highly improbable that there was any term, at least any short term, of prescription, otherwise we should surely find some impleaded church relying upon it. Then, to come to later times, the only terms of prescription or limitation that our common law admits (if indeed our 'common law' can be said to admit any) are extremely long terms; it is thought no absurdity that an ousted owner and his heirs should have a century or thereabouts within which to recover their land [2], or that the claimant of a prescriptive right in Henry III's time should be expected to assert that he has exercised it ever since the Norman Conquest. Then again these terms never seem to be the outcome of any general notion; they are imposed from time to time by statute or in earlier days by royal ordinance. Then again we never obtain any real acquisitive prescription for land or moveables; the true owner may be deprived of his remedies, but 'it is commonly said that a right can not die [3].' Certainly this does not look as though our law had at any time, however remote, contained the principle that quiet seisin for year and day will give ownership or bar claims. Lastly, when in Henry II's day we get a definitely possessory action for land it protects possession that has not endured for year and day, it will protect the very disseisor himself when he has been on the land for four days [4]. Thus in the main stream of the common law about possession and property there seems no place for year and day.

Still year and day is respected. Twice over Coke has given us a string of rules to illustrate the proposition that the common law has often limited year and day as a convenient time [5]. We will attempt to arrange his instances together with a few that he has omitted.

[1] See the Harvard Essays in A.-S. law, p. 253. It is just possible that among ecclesiastics the Roman prescription of thirty years was respected.
[2] Ordinance of 1237 in Bracton's Note Book, pl. 1217.
[3] Littleton, sec. 478.
[4] L. Q. R. iv. 29.
[5] Co. Lit. 254 *b*; 5 Rep. 218.

I. *Instances relating to rights of ownership or possession in which there has been no exercise of royal or judicial power.*

(*a*) In Bracton's day it was the opinion of some that the intruder, as distinguished from the disseisor, gained no legally protected possession until after the lapse of a year[1].

(*b*) 'By the ancient law,' so says Coke following Broke, 'if the feoffee of a disseisor had continued a year and day, the entry of the disseisee for his negligence had been taken away.' This was not the law of Bracton's day, nor of Littleton's. Conceivably it was the law of some intermediate period, but contemporary proof of this is wanting[2].

(*c*) The effect of a descent cast in tolling an entry can be prevented by the entry and claim of the true owner made within a year and day before the death of the wrongful possessor. But this can not be very ancient law, for the rule of Bracton's day protects even the disseisor himself[3].

II. *Instances in which there has been an exercise of royal or judicial power or in which the king's rights are involved.*

(*d*) After final judgment in a writ of right strangers had a year and day, reckoned from the execution of the writ of seisin, for putting in their claims; if they took no advantage of this they were barred.

(*e*) So in case of a fine strangers as well as parties and privies were barred if they made no claim within year and day from the execution of the writ of seisin.

(*f*) After judgment given in an action the plaintiff may obtain a writ of execution within year and day. Only for a year and day is the judgment kept in immediate suspense over the defendant.

(*g*) In the case of an estray if the owner, proclamation being made, does not claim it within year and day, it is forfeited. The right to estrays is a royal right.

(*h*) So in the case of wreck there is no forfeiture until after year and day. The right to wreck is a royal right.

(*i*) A villein dwelling on the ancient demesne cannot be claimed if he has lived there for year and day. This also looks like an outcome of the royal prerogative.

(*k*) The king has year, day and waste of the felon's land. For year and day it is under the king's ban.

[1] Bracton, f. 160*b*, 161; L. Q. R. iv. 34. [2] Co. Lit. 237, 254*b*; L. Q. R. iv. 289.

[3] Quiet possession for year and day played a part in the custom of the Cornish miners. Such possession gave the 'bounder' a provisional protection. But whether this is very ancient I do not know. See the various Acts of the Stannary Parliaments.

(*l*) A protection shall be allowed for year and day and no longer. A protection of course is a royal boon.

(*m*) An essoin for sickness holds good for year and day.

III. *Miscellaneous.*

(*n*) The widow or heir has year and day for an appeal of death. This rule is statutory[1]; earlier law had not allowed any so long a time.

(*o*) There is no murder or manslaughter if the injured man live for year and day after the injury. May not this curious rule, which still has a place in our criminal law, be an outcome of the limitation of a time for an appeal of homicide? If the period began to run from the time when the wound was inflicted[2], then an appeal could never be brought in case the victim lived on for year and day.

Now looking at this medley of rules we shall probably agree that they afford few, if any, materials for the history of the ordinary law about ownership and possession. Our first class of rules is small and does not look ancient; two of the three rules in it are not as old as Bracton, the remaining rule was uncertain in his day.

The rule again which gives claimants a year and a day for asserting their rights after a final judgment or a fine does not seem to be ancient. Bracton very distinctly says that all who are not under disability are bound so soon as the indenture of the fine is delivered to the parties. And he argues that this gives them long enough for the assertion of their rights:—the indenture is not delivered until fifteen days after the compromise has been made in court, so there are fifteen days within which claims can be made, and fifteen days is the time usually allowed for the appearance in court of a defendant who has been summoned. We thus see that the levying of a fine is regarded as a summons to all whom it may concern, and we are enabled to connect this judicial conveyance with the procedure against contumacious defendants. When a tenant in a real action will not appear the land is seized into the king's hand, and, unless the tenant replevies it within fifteen days, then it will be adjudged to the demandant. So in case of the fine, the true owner has but fifteen days in which to come forward and make his protest. How this time was enlarged from fifteen days to year and day I cannot say; but this happened in the interval between Bracton and Fleta[3]. In one way and

[1] Stat. Glouc. c. 9.

[2] See 4 Rep. 42 *a*; 2nd Inst. 320.

[3] Bracton, f. 436; Fleta, f. 443. See the so-called 'Statute' Modus Levandi Finis.

another therefore the term of year and day seems to have become more and more popular as a term to be set to claims of various sorts and kinds. The further back we look the more restricted is its operation, the more closely does it seem connected with prerogatival rights, or with exercises of royal or judicial power.

It must be confessed however that a very different inference has been drawn by some foreign writers from materials very similar to those that have come before us. Some remains of the old prescription, they argue, are preserved, those chiefly which interest the king or other powerful persons. Thus the rule about estrays is a relic of the old general rule. Once there was no claim for goods which for year and day had remained in the possession of a finder. The king or the lord with regalities set up a claim to the custody of stray cattle and in his favour the rule was still operative; after year and day they were his own. Now we ourselves have texts of the twelfth century which seem to take us back to a time when the king's claim to estrays had not yet reached its full dimensions, and yet they mention year and day as a term which bars claims[1]. But according to my comprehension of them they neither lay down nor even suggest the general rule that the loser of goods has no action for them after year and day. The person who after the lapse of that time is to be protected against claims is a person who has claimed goods and had them delivered up to him upon giving security that he will produce them in court if some other demands them. It seems presupposed that the delivery is made to him by a lord who has a court; thus he is not merely a possessor but a possessor who has obtained possession under an exercise of jurisdiction.

So again, to touch for one moment the most controverted point, there are many who would connect the safety of the villein who for year and day has dwelt in a chartered town, with the famous title *De Migrantibus*[2], and there are some who would see in that provision of the Lex Salica a direct proof of the primitive German prescription. The 'migrans' who has settled in a township contrary to the wish of any of its members becomes safe against them after lapse of a year. In one way or another a rule which had once compelled the folk of the township to put up with the presence of an intruder was twisted so as to give personal freedom to all who maintained themselves in the town for year and day. But whatever may have been the case in France, in England this rule

Statutes of the Realm, i. 214. It is noteworthy that Glanvill does not say that a fine has any effect on the rights of strangers. We may suspect that the law about this was evolved between his time and Bracton's.

[1] Leg. Will. Conq. i. 5. 6. On this see Jobbé-Duval, Revendication des Meubles, 21.

[2] L. Sal. 45.

has a very royal look; it is essentially a *privilegium*; the places in which it holds good are *loca privilegiata*, boroughs on which the king has conferred a special boon, or in later times all the manors of the royal demesne; it is much to the king's interest that his towns and his manors should be peopled[1].

On the whole, then, if we regarded only our common law the thought would probably never strike us that it contained the scattered fragments of an ancient rule under which possession continued for year and day ripened into ownership, or barred the claims of all who were not under disability.

Such is the case in the common law. But we have now to state some early evidence which has hitherto escaped attention. In the first place, there is a passage in the Leges Henrici Primi which may seem to imply some general rule to the effect that a person will to some extent or another be prejudiced by suffering year and day to go by without urging his proprietary claims[2]. Then again in the twelfth century and the first part of the thirteenth some of the English boroughs, and those the most important, had charters which conferred some degree of protection upon a possession of land continued for year and day: at least if that possession had been obtained under a conveyance perfected in the borough court. Proof of this shall be given:

Newcastle-upon-Tyne. Customs of the reign of Henry I as reported under Henry II.

Si quis terram in burgagio uno anno et una die juste et sine calumnia tenuerit non respondeat calumnianti, nisi calumnians extra regnum Angliae fuerit, vel ubi sit puer non habens potestatem loquendi. (Acts of Parliament of Scotland, i. pp. 33, 34; Stubbs, Select Charters, pt. iii.)

Lincoln. Charter of Henry II.

Concedo etiam eis [civibus meis Lincolniae] quod si aliquis emerit aliquam terram infra civitatem de burgagio Lincolniae, et eam tenuerit per annum et unum diem sine calumnia, et ille qui eam emerit, possit monstrare quod calumniator extiterit in regno Angliae infra annum et non calumniatus est eam, extunc ut in antea bene et in pace teneat eam et sine placito. (Foedera, i. 40; Stubbs, Select Charters, pt. iv.)

[1] Glanv. lib. 5. cap. 5; Bract. 190 *b*; Brit. i. 200; Stubbs, Introduction to Hoveden, ii. xxviii.

[2] Pueri autem ante xv. annos plenos nec causam prosequantur, nec in judicio resideant. De rebus hereditatis suae interpellatus post xv. annos defensorem habeat, vel idem respondeat, et calumpniam mittat in rebus suis ut nullus eos teneat uno anno et uno die sine contradictione, dum sanus sit et patriae pax. (Leg. Hen. 59, § 9.) The meaning of this seems to be that he who abates upon an infant heir gains none of the advantages of possession until a year and day after the heir has attained full age.

Nottingham. Charter of Henry II.

Et quicunque burgensium terram vicini sui emerit et possederit per annum integrum et diem unum absque calumnia parentum vendentis, si in Anglia fuerint, postea eam quiete possidebit. (Foedera, i. 41; Stubbs, Select Charters, pt. iv.)

Bury St. Edmunds. Statement by the burgesses of their custom in 1192 according to a chronicler of the time.

Burgenses vero summoniti responderunt se esse in assisa regis, nec de tenementis, que illi et patres eorum tenuerunt, bene et in pace, uno anno et uno die, sine calumpnia, se velle respondere contra libertatem villae et cartas suas. (Chron. Joc. de Brakel. p. 56. Cam. Soc.)

London. Statement of custom, probably of the twelfth century.

Item si civis Londoniae terram aliquam per annum et diem sine calumpnia tenuerit, alicui in civitate manenti respondere non debet, nisi qui terram illam post calumpniatus fuerit talis aetatis tunc fuerit quod calumpniari eam nescierit, vel nisi longor [corr. languor?] impediat, aut in patria hac non fuerit. (Libertas Civitatum, Schmid, Gesetze, Anh. xxiii.)

Nottingham. Charter of John. 1200.

Et quicunque burgensium terram vicini sui emerit et possederit per annum integrum et diem unum absque calumpnia parentum vendentis si in Anglia fuerint, postea eam quiete possidebit. (Rot. Cart. p. 39.)

Derby. Charter of John. 1204.

The same words as in the charter of Nottingham last cited. (Rot. Cart. p. 138 *b*.)

Northampton. 1199–1215.

In a writ of right for lands in Northampton the tenant pleads that he has held the land for year and day, 'et consuetudo ville est quod qui ita tenuerit non ponatur de cetero in placitum inde, et inde profert cartam domini regis per quam confirmat hominibus de Northantona quod nullus ponatur in placito de tenemento quod teneat infra burgum Northantone nisi secundum consuetudinem ville et ipse tenuit per unum annum et unum diem sine clamio quod ipsi apposuerunt.' No judgment. (Placit. Abbrev. p. 76.)

York. Bracton's Treatise. 1250–60.

Item consuetudo est in comitatu (?) Eborum quod mulier infra annum a die mortis viri sui petere debet dotem suam, alioquin postmodum non audiretur. (f. 309.)

York. 1226.

Action for dower before justices in eyre. The tenant successfully pleads the following custom:—'et consuetudo civitatis est quod non

debet ad tale breve respondere nisi calumpnia inde facta fuit infra annum.' (Bracton's Note Book, pl. 1889.)

Leges Quatuor Burgorum.

Quicunque tenuerit terram suam per unum annum et unum diem quam fideliter emerit per testimonium vicinorum suorum xii in pace et sine calumpnia qui eam calumpniaverit post unum annum et diem et si fuerit in eadem regione et de etate et ipse infra dictum terminum clamium non moverit super hoc nunquam audietur. Sed si fuerit infra etatem vel extra regnum non debet amittere jus suum cum venerit ad etatem vel repatriaverit. (Acts of Parliament of Scotland, i. 22, 23.)

Now a rule which we find in London, York, Lincoln, Nottingham, Derby, Newcastle and the four great Scottish boroughs is a very important rule. I have not been able to find it in municipal charters later than those here cited, and I suspect that it went out of use in the course of the thirteenth century, oppressed by the common law. The Assize of Novel Disseisin in Bracton's day protected even untitled possession against extrajudicial force, so there was no great need for giving special protection to possession continued for year and day.

But what did these civic customs protect and what measure of protection did they give? To take the last point first, it seems fairly clear that they were bars not only to self-help but to judicial proceedings; they acted not as interdicts but as statutes of limitation, they conferred a final and not merely a provisional protection. But did they protect untitled possession if continued for year and day or did they merely protect titled possession? The language in which they are stated is unfortunately vague; and we may not assume that the custom was the same in all places. But the Newcastle custom requires that the possessor shall possess 'juste,' the Lincoln, Nottingham and Derby customs suppose that he has come to his possession by purchase; the Scottish custom supposes that he has come to his possession by purchase duly perfected in the presence of twelve of his neighbours. Having regard to the common law and to the practice prevalent in the boroughs of conveying tenements in the borough courts, we should not, I think, be unwarranted in believing that a conveyance so perfected was or had been a condition requisite to start the term of limitation, the lapse of which would bar all claims adverse to the possessor. In that case the conveyance before the borough court would be the civic counterpart of the fine levied in the King's court.

In this context we may notice that in 1200 the burgesses of Leicester obtained from the king a charter sanctioning conveyances made in their portmanmoot without any reference to year and

day:—all purchases and sales of land in the town of Leicester duly made in the portmanmoot of the said town are to be firm and stable[1]. Probably this did not give a mere licence to the Leicester folk to make their conveyances in court if they chose to do so, but gave to conveyances so perfected a special sanctity. Probably the main object of such a provision was to preclude the claims of expectant heirs. In the Scottish burghs the rule about year and day seems to have been closely connected with the vendor's obligation of first giving an option of purchase to the members of his family before he sought for a buyer outside the family circle[2], and it is certain that in England at the beginning of the thirteenth century it was still very doubtful how far our law would enable the socager to alienate his land to the disherison of his kinsmen. In the process which made the law of Bracton's day so very different from the law of Glanvill's day, the practice of conveying land in court, here by fine, there by surrender, probably played a large part; the desire for freely alienable land found vent in the use of judicial and quasi-judicial modes of conveyance.

Now it would not be an unheard of thing for very ancient law to go on lurking in the chartered boroughs after it had been improved away from the country at large. The citizens of London, for example, went on purging themselves with oath-helpers in criminal cases long after less privileged persons had been forced to submit to trial by jury. Still in the face of what I have called the negative evidence it is hard to believe that we have here the scattered fragments of a primitive English usucapio. I say 'English,' for the clauses that I have cited are so very similar even in their provoking reticence to clauses contained in many contemporary charters of French towns[3] that quite possibly they are of French parentage. It is indubitable that the privileges of French towns were known and envied in the English boroughs, and from France they may have borrowed this 'possession annale.' Thus the venue of the problem would be changed from England to France.

The problem is one in which three great countries are concerned and is not to be decided off-hand. But so far as regards our common law the English evidence seems decidedly against the supposition of a primitive prescription or usucapio effected by peaceful possession for year and day, and in favour of the supposition that the effectiveness of this brief term had its origin in exercises of jurisdictional power, in the king's ban or the court's ban. The statements that we get of civic customs are, it must be confessed, vaguer than we could wish; and what is said in the Leges Henrici

[1] Rot. Cart. 32.

[2] Acts of Parliament of Scotland, i. 356.

[3] Alauzet, op. cit. 47; Parieu, op. cit. 56.

is just enough to stimulate our curiosity. An investigation of the prevalence of the custom of conveying land in the borough courts, or of having conveyances registered in the municipal archives might throw much light on the question. At present we may conjecture that originally the only possession that could become ownership by the lapse of year and day was a possession sanctioned by real or fictitious litigation[1].

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[1] In this context allusion has sometimes been made to the Welsh laws, a legal literature of very great interest which is crying aloud for a competent expositor. Now in the later versions of these laws we frequently meet with the term of year and day, and this term seems to serve as a term of limitation for claims of many different kinds, in particular for claims arising out of delicts. But, though I am utterly dependent on Mr. Owen's translation, it seems to me fairly clear that the undisturbed possession of land for year and day was no bar to proprietary claims. On the contrary for such claims an enormously long time was open. No man holds his land in safety unless his father, grandfather and great-grandfather held it before him, and even then his safety is not perfect; he may have to share the land with a claimant who has yet older rights, for the right of an owner does not become utterly extinct until eight generations of his descendants have passed away. On the other hand we see that when litigated land has been adjudged to a demandant the lapse of year and day has the effect of barring the rights of the family of his vanquished opponent. (See the passages referred to by Mr. Owen in his Index under 'Year' and 'Day,' and then see such passages as Cod. Ven., bk. 2. c. 14, Cod. Gwent., bk. 2. c. 30, §§ 10, 11; Miscellaneous Laws, bk. 9. ch. 27, § 18; bk. 14. ch. 23. §§ 2, 3.)

ON THE REJECTION OF HEARSAY.

WHEN, outside a court of law, a man wishes to acquaint himself with the real facts of some matter in dispute, he does not trouble himself about any technical rules of evidence, even if he be a lawyer by profession. He goes to those persons who, he thinks, are most likely to know anything of the facts, and interviews them, asking for and inspecting any documents which are in any way connected with the matter, and if necessary, viewing any premises or locality connected therewith. The only restrictions he places upon his inquiries are to keep his witnesses as near as possible to the points which he wishes to elucidate, and to search more particularly for those persons and documents which will be the best sources of information, although in default of these he will probably listen to evidence which, though it may not be the best, is the best procurable under the circumstances. These restrictions to his inquiries are not formulated as definite rules in his mind, they are the outcome of his daily experience and the natural lines upon which any such inquiry must proceed if it is to be successful. But directly such an investigation takes the form of a legal inquiry this natural method of procedure vanishes. A great variety of technical rules as to the admissibility of testimony, incomprehensible to the public and difficult of complete apprehension even by the most learned of lawyers, take its place. The law, with its distrust of the discernment of juries and its doubts of the honesty of witnesses, has, with a well-intentioned view to avoid the risk of the jury being deceived and the witnesses tempted to perjure themselves, thrown out from the sphere of its inquiries a large body of testimony on the ground of incompetency, under the authority of what are called rules of evidence, quite oblivious of the fact that if the jurymen, desiring to probe the whole truth, were left to follow their own inclinations, they would one and all discard such technical assistance; also that probably if either the judge, or any of the counsel engaged were to wish to determine, out of court, for his own private information, from the witnesses and documents the truth of the facts in issue, he would at once follow the example of the jury, and proceed on the purely natural principles of every-day life.

It may well be doubted if the extremely artificial rules of the admissibility of testimony before judicial tribunals have been productive of anything but harm. Had they never existed, a vast amount of learned case law built on unstable foundations, and

much of it very doubtful common sense, would never have come into existence, and a great deal of injustice arising out of the application of these rules would not have been inflicted upon litigants. Until recent years there were two great branches of technical restrictions to testimony in courts of law which had no counterpart in common life. They were the Incompetence of witnesses themselves upon the ground of interest, and the Incompetency of parts of witnesses' evidence on the ground that it was Hearsay. Both were based upon the same foundations: the distrust of the capacity of jurymen to detect falsehood, and the fear of the perjury of witnesses. The incompetency of witnesses on the ground of interest is now a thing of the past, except perhaps in the case of a prisoner and the husband or wife of a prisoner in criminal trials. These are, however, sometimes placed upon other grounds. We propose to consider whether the present system of rejecting parts of witnesses' testimony on the ground of hearsay ought not also to go. If there were at the present moment no rejection of hearsay in our Courts, and it were suddenly proposed to adopt the present extraordinary mass of technicalities which form the rules of evidence on the subject, such a proposition would probably meet with derision on all hands.

It is desirable to mention here that it is often said hearsay testimony is rejected on the ground that it is irrelevant. This is not a correct view, we venture to think, although justified by authority, for hearsay is often most relevant; in fact, any hearsay connected with the issues must be relevant, and to say it is irrelevant is merely a disguised way of saying that hearsay is rejected because it is not considered sufficiently trustworthy or *competent* to be placed before the jury, in exactly the same way that formerly witnesses who had an interest in the verdict were not considered sufficiently trustworthy or competent for their evidence to be taken into consideration.

Sir Henry Maine, in his essay on the 'Theory of Evidence,' points out that the great bulk of the present rules of evidence 'were gradually developed as exceptions to rules of the widest application which prevented large classes of testimony from being submitted to the jury. The chief of these were founded on general propositions of which the approximation to truth was but remote. Thus the assumptions were made that the statements of litigants as to the matter in dispute were not to be believed, that witnesses interested in the subject-matter of the suit were not credible, and that no trustworthy inference can be drawn from assertions which a man makes merely on the information of other men.' All these objections rested upon the insufficient appreciation of the capacity

of jurymen to discriminate between that testimony which was worthy of credit and that which was not; although by a very contradictory line of thought the jury has always been, and is to the present day, held to be pre-eminently the tribunal for determining the facts in cases of fraud or direct conflict of testimony.

The alleged reasons for the rejection of hearsay and of witnesses on the ground of interest being of the same general character, though possibly differing in degree, we will shortly remind our readers of the history of the gradual admission of interested persons as witnesses, and the objections formerly urged to these changes in the law. This will throw much light upon our present subject, and will, we think, form a strong argument in support of our contention that the rejection of hearsay is a mistake.

Prior to 1833 every person having an interest, however minute, in the result of the proceedings was absolutely barred from being a witness. The law had so little confidence in the capacity of jurymen to detect fraud, and so little faith in the integrity of witnesses, that lest any untruth should be presented to the jury, a law of evidence had gradually grown up the net result of which was that in the great majority of cases every one who knew most about a matter in dispute was rejected as incompetent. Yet this extraordinary state of affairs was not merely tolerated, but justified by many able lawyers; and the public, to some extent guided by and following the lawyers, acquiesced in this, to us, viewing it by the light of subsequent events, most iniquitous state of the law. The fearful havoc played with the fortunes of the litigants when in court can easily be imagined, and also the large proportion of cases where parties had to submit in silence to wrongs because they knew or were advised they would have no evidence to produce which the court would hear.

In 1833 the first inroad upon the exclusion of evidence on the ground of interest was made by 3 & 4 Will. IV, c. 42, sec. 26, which enacted that 'in order to render the rejection of witnesses on the ground of interest less frequent, if any witness should be objected to as incompetent on the ground that the verdict or judgment in the action would be admissible in evidence for or against him, he should nevertheless be examined, but in that case the verdict or judgment should not be admissible for or against him or any one claiming under him.' A much larger step was taken ten years later, in 1843, by Lord Denman's Act, by which all persons (with a few exceptions) were made competent witnesses, excluding only the parties to the suit and the husband or wife of a party.

But the lawyers and the public now began fully to awake to the

mistaken policy of rejecting relevant testimony on the ground of interest, and in 1851 all parties to a suit and other interested persons became competent and compellable to give evidence, with the exception of husbands and wives. In 1853 husbands and wives of parties and interested persons became competent witnesses. The consequence of these reforms, for we may now well call them reforms, as no one would suggest a return to the old system, may be shortly summarised as follows:—For centuries a mass of legal lore had been accumulating, of which the learned deductions and discriminations had misled generations of lawyers; to look into the law was to lose all clear vision of the real necessities of the case, and to become confounded with a huge structure of ingenious conclusions and distinctions, based upon dubious assumptions. In fact, after this vast amount of labour and this fearful havoc among litigants for centuries, we have come to the conclusion that the natural instinct of the juryman was right, and that the method he adopts in his daily life, and which he would adopt in court if he were permitted to follow his own inclination, of hearing all the persons connected with the dispute, is the right one.

The juryman is not afraid of being deceived if left to his own methods; he is quite aware of the motives to dishonesty with interested parties, and is watchful and suspicious of fraud where there is interest, but by hearing them, even if they distort the evidence or swear falsely, he feels he knows more and is better able to give a true verdict. Shall we not carry our faith in the juryman's discernment a little further, and trust him with all the witness has to say, including hearsay, so long as he keeps to the point, and thus bring our law of evidence very close to his own unconscious rules? The juryman gives credit to his customers, invests his money, and generally carries on all the transactions of his life upon statements and representations often entirely hearsay, and this hearsay comes from persons who may have personal prejudices or a strong interest in misrepresentation. The juryman does not refuse to listen to these statements because 'hearsay is no evidence,' but is only too glad to receive information from any source, and generally succeeds in estimating it at about its right value. Thus, in a court of law, we have hearsay withheld from the juryman lest he might be deceived, when he spends a large part of his daily efforts in assessing it at its true value, and is thus peculiarly able to draw correct inferences from such testimony.

Apart from these general considerations and the argument they make for the admission of hearsay, we propose to consider shortly in detail the objections which are urged against this description of testimony, and to point out that many of them are more imaginary

than real. We do not wish to deny that there is much weight in some of the objections, just as there was in the objections to witnesses on the ground of interest, our contention being that on the whole more harm than good is done by rejecting hearsay.

We cannot state the case against ourselves more tersely or forcibly than by quoting a paragraph from Pitt Taylor's Evidence, 8th Edition, vol. i. p. 509, which incorporates the expressions of the American Chief Justice Marshall, in the case of *Mina Queen and Child* v. *Hepburn*, 7 Cranch's Reports, Supreme Court, U.S.:—

'That this species of evidence is not given upon oath, that it cannot be tested by cross-examination, that it supposes some better testimony, which might be adduced in the particular case, are not the sole grounds for its exclusion. Its tendency to protract legal investigations to an embarrassing and dangerous length, its intrinsic weakness, its incompetency to satisfy the mind as to the existence of the fact, and the frauds which may be practised with impunity under its cover, combine to support the rule that hearsay is inadmissible.'

To take these objections in their order:—

It is quite true that hearsay testimony is not *on oath*, in the sense that the witness does not swear to the truth of the statements made to him, but only to the truth of his report of the statements. But it is this true report which the jury want, just the same as they want the true report of what the witness himself said, although at the time he was speaking he may not have spoken truly. If the statements be important, and the person who made them be called at another stage of the trial, the witness's account will corroborate or contradict that person's testimony, and if he cannot be called, very important points in the case may be excluded. Moreover, this objection cannot be of much practical value, as under the curious exception of 'admissions' to the general rule excluding hearsay, these hearsay statements are constantly accepted, and are of the greatest value in checking the evidence of the opposing party and also of the witness himself.

Whether or no a true report is given of statements made to the witness is probably as easy a matter to *cross-examine* to as the statements of the witness himself, or his account of his doings. Certainly the witness himself will be more easily detected in falsehood if he has to give a continuous account of his conversations and doings, than if he be able to shelter himself by only disclosing a part.

It is only sometimes true that hearsay '*supposes some better evidence which might be adduced in the particular case.*' Frequently, through death, ill-health, or absence at a distance, or other cause,

no other evidence of a particular fact is obtainable, and then great injustice may be done by its exclusion. But much turns on the word 'better.'

Possibly *A*'s own account in the witness-box of what he said or did is, if he be a reliable witness, of more value than *B*'s report of *A*'s account to him. But just as 'admissions,' that is, hearsay evidence of statements by the parties to the suit, are very valuable checks upon the evidence of the parties, so hearsay evidence from *B* of what *A* said may be of great value, especially if much turn upon *A*'s evidence. Moreover, *B*'s memory of what *A* said to him is just as likely to be accurate as his memory of what he himself said, and if *A* be absent through death, ill-health, or distance, or other cause, then *B*'s evidence of *A*'s statements is surely most material matter to be taken into consideration by the jury with the other circumstances of the case. It is true this may be obtained in cross-examination, but if so, is there sufficient reason to reject it in examination-in-chief? To do so makes *A*'s statements evidence at the option of one party and not the other.

We do not believe that the admission of hearsay evidence would in general tend to *protract judicial investigations;* we believe that in many cases it would shorten them. In some cases where other evidence is not forthcoming, or where the hearsay was particularly important, it might prolong a trial, but under these circumstances it cannot be contended that because important evidence takes time it should be rejected. The same objection operated with far more weight against the admission of interested parties as witnesses. In most cases we believe that the completeness of the witnesses' testimony and the greater speed with which it could be given without constant interruptions, would enable counsel to rapidly pick out the real points in dispute, instead of having to fish about for them in lengthy cross-examinations.

As to the '*intrinsic weakness of hearsay and its incompetency to satisfy the mind as to the existence of the fact,*' we entirely agree with this objection to a large amount of hearsay which might be offered in evidence. But the answer is very simple. When hearsay is offered which is '*incompetent to satisfy the mind of the existence of a fact*' it is irrelevant, and like other irrelevant evidence it would be excluded at once by the judge. We are advocating the admission of relevant hearsay, not of irrelevant hearsay, any more than of any other irrelevant matter. Only when the hearsay was likely to throw some light on the issues would it be admitted. Our contention is that much hearsay which would greatly assist the decision of issues of fact is rejected under

the existing rules of evidence, and that such relevant hearsay ought not to be rejected.

Lastly, '*of the frauds which may be practised with impunity under its cover*,' we do not believe in them. That false hearsay evidence should be successful is not more likely than that false evidence of any other kind should mislead the jury. But we do believe that fraud is sometimes covered by the rejection of hearsay. We have faith in the discernment of the jurymen when they hear all; they are used in their ordinary transactions to assess the value of hearsay, and we believe that the jury are more likely to arrive at a correct decision when everything is before them than when a part is kept back. An untruthful witness is soon detected, especially if he be made to tell his whole story.

The practice of the old Ecclesiastical Courts and of the Court of Chancery was very lax compared with the rigid rule of exclusion in the Common Law Courts, and notwithstanding the great aversion to hearsay in our legal system, there is still the remarkable exception of interlocutory applications, where hearsay evidence is allowed to be read. This is very inconsistent, for if hearsay is dangerous and misleading, as is commonly supposed, why admit it in interlocutory matters any more than at the trial? It is sometimes given as a reason that interlocutory applications come before a judge alone, but if this is so why is not hearsay admissible testimony at the trial by a judge alone? And if so, are not twelve jurymen generally held to be collectively as able to detect falsehood and fraud in a witness as a judge?

We have always for simplicity spoken of the issues being decided by a jury, but our remarks apply equally to a trial before a judge alone; indeed, with even more force, if we accept the generally received view, as illustrated by the acceptance of hearsay in interlocutory applications, that the judge could reject those parts of the evidence which are not worthy of credence with more facility than a jury, a view in which we must, however, confess that we do not concur.

Sir Henry Maine's essay, from which we have already quoted, dwells principally upon the Indian Evidence Act of Sir James Stephen, and the historical influence of English rules of evidence upon Indian law, and does not direct itself, except incidentally, to the consideration of how far these rules are expedient in themselves. But he seems to regard these rules of more value as a guide to the mind in assessing testimony when given than in rejecting it. Thus he writes: 'An Equity judge, an Admiralty judge, a Common Law judge trying an election petition, an historian, may employ the English rules of evidence, particularly when stated affirmatively,

to steady and sober his judgment, but he cannot give general directions to his mind without running much risk of entangling or enfeebling it, and under the existing conditions of thought he cannot really prevent from influencing his decision any evidence which has been actually submitted to him, provided that he believes it.' Again he writes: 'The system of technical rules fails whenever the arbiter of facts—the person who has to draw inferences from or about them—has special qualifications for deciding on them, supplied to him by experience, study, or the peculiarities of his own character, which are of more value to him than would be any general direction from book or person. For this reason a policeman guiding himself by the strict rules of evidence would be chargeable with incapacity and a general would be guilty of a military crime.' We think that the juryman has in his daily experience qualifications for the assessment of testimony which are of more value to him than 'any general direction from book or person.' Just as the policeman may track a thief by taking advantage of hearsay, when he would not do so if he followed the rules of judicial inquiries, so we think the jury would often scent the truth and real motives of the parties to a proceeding from testimony which is now not allowed to be submitted to them.

It is a noteworthy fact that nearly all the cases which are quoted as authorities for the rejection of hearsay, show upon the face of them that the whole question in dispute could not have been satisfactorily submitted to the jury without taking into consideration the very evidence which it is decided the law does not admit. In an inquiry outside a court of law the evidence rejected would have been considered most material and relevant, and in many cases the jury might have come to a different decision had the whole of the evidence been before them. Can it be seriously suggested in these cases, that the jury would have been deceived by hearsay evidence of no value, more than by other false testimony which may have been admitted? The indirectness of testimony, the interest of witnesses, the facility to perjure, are all circumstances which arouse the suspicion and watchfulness of the jury to the utmost.

The two cases quoted in Sir James Stephen's 'Digest of the Law of Evidence,' as authorities for the proposition that hearsay is in general inadmissible testimony, are: *Sturla* v. *Freccia*, L. R. 5 App. Cas. 623, and *Stobart* v. *Dryden*, 1 M. & W. 615. *Sturla* v. *Freccia* was a suit to ascertain the next-of-kin of an intestate; the principal question was as to the identity of Mangini, the father of the intestate, with a person of that name who was born at Quarto, near Geneva. Mangini had applied to his Government, in 1789, to be appointed diplomatic agent in England. His Government

handed his application over to a committee for report as to the propriety of the appointment. In the course of the report which was rendered he was described as 'a native of Quarto, of about forty-five years of age,' and it was also stated that the facts had been ascertained from persons well acquainted with him. The House of Lords held that this report was inadmissible on the ground that it was hearsay evidence, and not within any of the recognised exceptions. In this case there was strong suspicion that the report had been tampered with, and it is very likely that a judge or a jury would not have been satisfied to accept its statements; but to decide that this document was not to be considered by the tribunal at all, never mind how unimpeachable it might have been, was a decision as entirely contrary to one's ideas of the common-sense way of conducting an inquiry into the birthplace and identity of Mangini, as it might have conduced to a wrong decision on the facts if the document had been irreproachable. We think that a perusal of *Stobart* v. *Dryden* will also lead to the conclusion that the evidence rejected as hearsay ought to have been submitted to the jury.

It is frequently contended that a legal inquiry must, in its nature, be of a different character to an inquiry in common life, but we fail to see any essential difference as regards the kind of testimony which should be admitted, or why hearsay should be suppressed before a court of justice when it is often valuable testimony in the affairs of every-day life and a large part of the business of the world is carried on upon hearsay statements. In a court of justice there are greater powers for the discovery of the whole facts by the compulsory examination and cross-examination of witnesses, and the production of documents, hence the greater facility to detect fraud. If, therefore, hearsay is accepted outside a court of law as valuable testimony, it certainly ought to be accepted inside.

As no one would now propose a return to the old system of excluding witnesses as incompetent, on the ground of interest, so we contend that if hearsay were once admitted no one would suggest a return to the present cumbrous rules by which it is rejected as incompetent. The exclusion of witnesses and the exclusion of hearsay have both arisen from the same mistrust of the discernment of juries. The exclusion of witnesses has been shown to be a mistake by experience, though long strenuously opposed by great authorities; we believe that the admission of hearsay would also be justified by experience.

The rejection of hearsay proceeds upon principles and exceptions which are extremely difficult of apprehension and which have no

counterpart in common life. The rejection of hearsay often leads to the suppression of most important and valuable testimony. The very cases which are the authorities for the rejection are examples of the injustice of this practice.

The attention of jurymen is strained and often defeated by the discontinuity in the proof of a witness; the witness himself is flurried by constant interruptions in the thread of his evidence; full reports of conversations often become impossible; a fraudulent witness is less easily detected in his evasions or perjury because his narrative is so artificially told, and thereby the rejection of hearsay often becomes the cover of fraud.

LEWIS EDMUNDS.

THE LAND TRANSFER BILL.

THE Land Transfer Bill of 1889 appears in a very different form from that of former years. The measure has been referred to a Select Committee of the House of Lords, and their labours can be traced in almost every clause. It is not too much to say after it has undergone such learned revision that unless it is now worthy of acceptation there must be some inherent fault in the scheme itself, and that any further attempt to recast it will be labour lost. So long as the Bill was merely engrafted on the Land Transfer Act of 1875 it was recognised as being only tentative. Now however that the earlier Act is to be repealed and incorporated in the new one, the Bill must be looked upon as a candidate prepared to pass. To refer it to another Committee would be either a reflection upon the former one, or a confession of failure.

Now it is matter of common knowledge that the proposals of the Lord Chancellor as embodied in the Bill have been generally received by both sides of the profession with great disappointment. Lord Halsbury had allowed it to be announced that he was ambitious on the project of Land Transfer, and had views of his own thereupon: it is well known that he approached the subject with a mind unclouded by prejudice in favour of the existing system. Nevertheless it was rather a shock to lawyers to find that the old system, which with all its faults had shown itself very capable of adapting itself to the needs of our civilization and which can be amended to any extent, was to be utterly abolished, and a new system, about which nothing is known except that it has failed, to be compulsorily imposed.

But from his own point of view Lord Halsbury is perfectly right. The 'people,' which in this sense is synonymous with those who know nothing about the subject, are crying out for a change. The alternative to the existing system is registration of title. The profession are convinced that, in the majority of transactions, registration of title has no chance in a fair field against conveyancing by deed. Lord Halsbury evidently is of the same opinion, and being desirous of not adding another failure to the list, he intends to secure success by the strong arm. The 'people' will only have themselves to blame if they find out when it is too late that the King Stork of Registration is a greater burden than the King Log of Parchment.

It may be taken then that the Lord Chancellor has nailed his colours to the mast. Optional Registration he considers, and rightly considers, will be no credit to himself or his colleagues. The choice lies between the existing system and compulsory registration. These few pages are devoted while there is yet time to showing that the system of the Bill is impracticable, and that registration of title under it will be no more expeditious and far more expensive than the existing system of conveyancing by deeds.

The Bill provides for the registration of every title as absolute, qualified, or possessory. These objectionable epithets are borrowed from the Act of 1875. For the future every title will have to be classified under one or the other. It is not unreasonable in these circumstances to ask that some definition should be given of terms which in themselves are utterly unmeaning. 'Absolute' may be anything either good or bad. Of 'qualified' it can only be stated that it is not 'absolute.' From 'possessory' nothing can be gathered except that it sounds very unpromising. And yet apparently most landowners will have to be content with a mere 'possessory' title and make the best of it. Anybody who is in possession of land and is prepared to make a statutory declaration accompanied by a map (sect. 6) will be entitled to be registered with this kind of title. Obviously if registration is compulsory, registration must be made attainable. But why, it may well be asked, should good and bad titles alike be labled with a description which, though perhaps not positively offensive, is certainly anything but inviting to customers?

It will be well, seeing that the Bill is silent upon the meaning of its labels, to try to gather from its contents what sort of titles will be permitted to receive what are apparently intended to be the superior decorations. A person may be registered as owner of land with an absolute title if it appears to the registering authority that he is justly entitled to an estate in fee simple; sect. 7, sub-sect. 5. The words here, 'justly entitled,' are probably unique in an Act of Parliament. It cannot mean either 'legally' or 'equitably,' because no one could expect to be registered with the highest attainable title, if he only had the legal or only had the equitable estate in fee simple. It can scarcely mean 'both legally and equitably,' because there is no reason why, if it means this, it should not be so expressed: besides, the word 'entitled' by itself seems sufficiently clear. It apparently has some reference to the domain of morals, and is intended to enable the registrar to refuse the highest honours where he has reason to suspect that the applicant has poisoned his elder brother, or suppressed a will, or obtained the land by any means not strictly respectable.

However this may be, it is improbable that any one except the rashest of men will run the risk of applying for registration with an absolute title, because if he does that which is done and must be done on the occasion of almost every sale under the present law by means of conditions, suppresses or conceals some slight flaw in his title, he becomes liable to imprisonment with or without hard labour for a term not exceeding two years, or to a fine not exceeding £500. If any one wishes to see this in black and white let him turn to sect. 56.

With regard to a 'qualified' title, the only light thrown on the word is to be gathered from sect. 8, which provides for this kind of registration where 'the title can be established only for a limited period or subject to certain reservations or exceptions.' As this conveys no meaning whatever, and as moreover a landowner will desire his title to be anything but 'qualified,' it seems probable that there will not be many applications under this section, and its exact intention is hardly worth pursuing further.

A clause which at first sight seems to throw some light upon the meaning of the different kinds of title is clause 10, providing for the promotion of possessory and qualified into absolute titles. The clause, which is a short one, directs that 'the registering authority shall on the application of a person registered with a possessory or qualified title examine his title, and thereupon shall, if satisfied upon the evidence that he is entitled thereto, register him as owner of the land with an absolute title, or with a qualified title as the case may be.' This clause is partly compulsory, partly optional, so far as the registrar is concerned. He shall do what is required if satisfied that the applicant is entitled thereto. It is to be observed that this section does not require him to show himself to be 'justly' entitled, thereby holding out hopes to the suspected poisoner or forger, if indeed the most plausible interpretation of section 7 sub-sect. 5 is the correct one, of obtaining eventually the summit of his ambition.

But a difficulty arises on a comparison of section 10 with section 29. By the former, as has been seen, the registrar, if satisfied upon the evidence of the applicant, is thereupon to register him accordingly. The latter section also contains provisions for the promotion of titles to the higher class after evidence has been supplied, but the promotion or confirmation as it is called is not to be bestowed until after the expiration of five years, and then only if the registrar is satisfied with the evidence. Moreover, under this section the applicant is required to make an affidavit with all the consequences thereto appertaining under sect. 56. It is so difficult to reconcile these provisions, if indeed it is not impossible,

that the most reasonable supposition is that clause 10 was intended as an alternative to clause 29, and that when the former was accepted the latter was by inadvertence allowed to remain.

These remarks would not have found their place here had it been a mere question of verbal criticism, had nothing more been required than a definition. The whole scheme is vitiated by the division of titles into these three kinds, with the absolute impossibility of giving any description beforehand of the kind of titles which will be relegated to the different headings. It is a matter which is left, and which must be left, to the registrars, with the inevitable result that a title, which by an easy-going registrar will be accepted as absolute, by a more precise or more diffident registrar will be condemned as qualified or possessory. It may even be that the same title under which lands belonging to the same person are held in different districts will be entered as absolute in one registry and as qualified or possessory in the other. This cannot be otherwise, for it is impossible to lay down hard and fast lines to guide the registrars in their examination of titles. The mere statement that the Bill provides for the classification under these headings without defining what they mean is a condemnation of the scheme. In the Act of 1875, where registration was optional, the objection was not of such force, but to compel landowners to submit their titles to be docketed according to the caprice, the knowledge, or possibly the ignorance of a registrar, may look sufficiently plausible on paper to pass muster in the Houses of Parliament, but will certainly not stand the test of working experience. Far easier, far cheaper would it be for the registrar to examine the title and register it with such comments as he thinks fit, that a registered title should be simply a registered title, and that the purchaser should examine the record and estimate it himself, without any guarantee except against defects not appearing on the register or on a personal inspection of the property. However, the Bill is scarcely open to amendment in this direction. The lines have been laid down and are adhered to with a tenacity which forbids any alternative to 'c'est à prendre ou à laisser.'

The difficulties are by no means over when the applicant has induced the registrar to enter his title in one or other of the categories. It remains to be considered what the effect of registration is. This will be found to be rather startling. A person may be registered as a full owner or as a limited owner. Passing over without further comment the inelegancy of these expressions, let us see what the Bill provides. 'On registration with a possessory title of any person as full owner of land an estate in fee simple in

the land held under such possessory title shall, subject to the proviso in sub-section 5 mentioned, be vested in the person so registered' (sect. 6, sub-sect. 3). Sub-sect. 5 safeguards the existing rights of other persons. Now it must be borne in mind that any person in possession who claims to be entitled must be registered with a possessory title without any investigation. Either an estate in fee simple is already vested in him or it is not. If it is, why should the Act declare that upon registration the estate in fee simple shall vest in him; if it is not, how can it vest the estate in fee simple in him subject to the estate in fee simple which already subsists in somebody else? If however the applicant is registered with a possessory title as limited owner of land under a settlement (sub-sect. 4), or with absolute title as limited owner (the words 'under a settlement' are here omitted) (sub-sect. 5), then in either case 'an estate in fee simple in the land shall be vested in him and the other persons entitled to the several estates and interests comprised in the subject of the settlement collectively according to such estates and interests respectively.' Here again the same criticism at once occurs, why vest by the Act what is already vested, or if not vested why now vest? And there is here this further difficulty: if the settlement does not deal with the entire estate in fee simple, but gives only a contingent remainder in fee with a resulting trust to the settlor under a deed or with an intestacy under a will, why convert the contingent estate into a vested estate? and what is the effect of so doing? Perhaps it is safer to turn to other points before being drawn into the regions verging upon perpetuity.

Upon one point at least the Act is clear. A registered owner of land may transfer the land or any part thereof: he may also charge the land with the payment of money either with or without interest. This is expressly provided in so many words; see sects. 11, 15. It is quite a relief to come upon something as to which there seems to be no doubt whatever. But why should the Act tell a man he may do such simple things as sell or mortgage his own property? Either he can do so without any special authority, in which case the words are quite unnecessary; or if authority is required before a registered owner can move hand or foot, the Act should also provide in similar terms that he may grant leases of his land and may settle it, neither of which it does.

Yet another difficulty arises on the question of 'charges.' Until the owner of the charge is registered as such the instrument of charge shall operate only as a contract and not as a mortgage; sect. 15, sub-sect. 2. What is meant here by 'contract' and 'mortgage'? A contract to lend money upon mortgage cannot be

specifically enforced: where money has been lent on a written agreement to execute a legal mortgage, or on a mere deposit of deeds, it is a mortgage already. It may be said that what is meant is obviously a legal mortgage. Be it so; let us see how far the rest of the provisions support this view. In the first place, the instrument of charge as given in the schedule abstains from anything approaching to a conveyance or transfer of the land: it is nothing more than a charge of the loan on the land with a covenant for repayment. It is true that sub-sect. 4 declares that the instrument of charge shall operate as a mortgage by deed within the meaning of the Conveyancing Acts; but this is apparently only intended to confer the power of sale and other powers thereby given, if at least a deed can properly be said to operate at all within the meaning of the Acts. If however it be granted that the legal estate passes to the registered owner of the charge, then there is no provision in the body of the Act for getting it back again, and no instrument is inserted in the schedule for that purpose. On the satisfaction or release of a charge being notified on the register the charge shall cease to operate (sect. 17, sub-sect. 1), whatever that may mean. We are therefore reduced to this dilemma: either the legal estate, on a charge being registered, passes to the mortgagee, in which case it cannot be got back under the Act; or it does not pass, in which case the threat in case of non-registration contained in sect. 15, sub-sect. 2 is a *brutum fulmen*. In any event so important a question as the effect of a mortgage upon the legal estate ought not to be left to be gathered from the obscurity of the Act. In this connection sect. 18 may be referred to as worthy of its predecessors: 'The provisions of this Act with respect to the transmission of registered land and the defeasance of the estate of the registered owner shall apply, with the necessary modifications, to transmissions and defeasances in the case of registered charges on land.' The modifications will certainly be very necessary.

But, it will be said, these are mere matters of detail, and, as is stated in the memorandum prefixed to the Bill, matters of detail are left to be settled by rules. No doubt to a certain extent matters of detail may be safely left to be settled by rules. But this Act is absolutely unintelligible without the rules, and if the one is a foretaste of the other it will be equally unintelligible with them.

Not only is the system proposed impracticable if applied universally, but even if it is got into some sort of working order it will be found to be probably less expeditious, and certainly far more expensive, than the existing system. In connection with this point it is impossible not to call to mind the advertisement issued last February by the Land Registry Office, that being the best

guide to the expected length and cost of transactions under the new measure. From this it appears that although the staff of the office 'has for some time past been reduced, by various causes, to the minimum necessary to cope with the daily business,' yet the annual expenses are largely in excess of the receipts from fees. Regret for the various causes so delicately alluded to must be mingled with satisfaction that the excessive staff has been at last reduced to the necessary minimum, but inasmuch as the whole number of titles on the books only amounts to something over 3,500, it must be exceedingly difficult to provide a small enough staff suitable to cope with the daily business of the office. Hence evidently the necessity for raising the fees. But even the increased fees are only 'about one-fifth of the scale of costs which a solicitor is authorized to charge for conveyancing,' while the arrangements of the office are such that 'proprietors may easily conduct their transfer business in person.' In fact, 'the vendor will hardly ever require a solicitor, and most purchasers of average business capacity will be able to do their own work also'; and 'where a registered estate is sold or mortgaged as a whole, there is no reason whatever why the transfer or charge should not be completed by the parties themselves in a quarter of an hour.' Then follows a tabulated statement of the office fees, with and without the fees payable to a solicitor employed where the title is registered, with an exhortation to 'Compare a solicitor's costs' where the title is not registered, such costs being set out below with a footnote to the effect that both vendor and purchaser pay these costs, so that they may be reckoned at double the amount given, with perhaps counsel's fee in addition.

So strong a light is thrown upon the expected working of the present Bill by this advertisement, issued shortly before the first reading, that it is necessary to refer to it at least to the extent above set out. Now without pausing to enquire whether a public office is justified in doing what, if done by a private practitioner, would result in his speedy exclusion from the society if not from the ranks of his profession, it may as well be stated at once and in plain terms that the advertisement is grossly misleading.

We are dealing, be it remembered, with the purchaser of average business capacity, the vendor need not even be this. The work in a simple case is to be done in a quarter of an hour. The first question asked by the purchaser of average business capacity on entering the registry office would naturally be as to the title of the proposed vendor. 'Certainly, sir,' replies the registrar; 'a very nice title, just the article required; a possessory title; we are selling a great many of them just now.' 'A what sort of title?' asks the purchaser. If the foregoing pages have not entirely missed their

mark, it may be safely left to the reader to decide whether the registrar will succeed in explaining the difference between absolute, qualified, and possessory titles to a purchaser of average business capacity in the space of a quarter of an hour. The thing might perhaps be done if it were the case of a man of less than average capacity who omitted to ask any questions at all, or of a Lord Chancellor who knew all about it beforehand.

But putting aside the question of time, how can the transaction possibly be carried through without a solicitor? Two men walk into the office, both utterly unknown to the registrar; one claims to be John Doe the registered full owner of Blackacre, the other is honest Richard Roe the would-be purchaser. Is the registrar to take the mere word of a stranger, and after seeing him walk off with the purchase money register Mr. Roe as full owner? If so, the provisions of the Bill relating to the insurance scheme will require considerable expansion. If not, what evidence of identity will be required? A solicitor is *ex hypothesi* excluded, as the person to be got rid off at all costs. Will a bishop or a parish priest or a dissenting minister or a shopkeeper, and how many of them, be accepted as witnesses of identity, and who is to warrant them? And what is more important, who is to compel them to attend? And what is most important, by whom and on what scale are they to be paid?

Perhaps it is unnecessary to say more upon the subject of this advertisement. This however may be safely asserted with regard to the expedition likely to be attained by the Registry Office, that although there is of course no inherent necessity for public offices to be deliberate (the expression is mild), any one who has had experience of the existing registry will simply refuse to believe that after the Act has passed the same or any similar office will carry through a transaction with the speed with which it can be done, and is done, in a solicitor's office when occasion requires. While, on the subject of costs, if any man supposes that the burden of registration with the necessary statutory declarations, prescribed maps, applications for confirmation, notices, advertisements, affidavit on application, affidavit on confirmation, further evidence if required, fees on registration, on application, on confirmation (this list be it remembered is before the rules have been issued, and what more may be required no one can tell), with the possibility that the greater part of the expense may be altogether thrown away on the failure of the application,—if any man supposes that this burden will be less than that under the existing scale of charges under the Solicitors' Remuneration Act (solicitors in simple cases or in special circumstances do not always make the full charge), that man can only be the author of the advertisement of the Land Registry

Office, perhaps the staff therein referred to as reduced to a minimum. Moreover, in any comparison between the costliness of the two systems, it must not be overlooked that the new system will impose costs on the landowner in cases where no charge whatever has hitherto been made: thus on the death of any landowner, the successor will be mulcted of the registration fee, although he desires to do nothing except succeed to his inheritance; sect. 3, sub-sect. 2: and inasmuch as on the death of every 'full' or 'limited' owner an entry in the register will have to be made notifying the succession, a constant and regular supply of fines and fees may be counted on by the office to which the existing system can furnish nothing worthy of comparison, and which solicitors left out in the cold will regard with envy and admiration.

The provisions of the Bill for ascertaining and registering boundaries, in other words for stirring up strife between adjoining owners (see sects. 33–37), are not calculated to make registration particularly cheap. Nothing perhaps in the whole measure is more artistic than the manner in which, while the ease is shown with which adjoining owners can register their boundaries as conclusive by agreement, the result is left to the imagination in the much more probable event of their disagreeing. The peace of quiet country places will be broken, old friends who for years have sported together over each other's acres will exchange looks of defiance across the hedge, and the young heir's first intercourse with his neighbours after he comes into possession will be in border warfare.

If indeed registration were a thing to be desired in itself, like canonization or presentation at court, if it came down upon the land like 'the gentle dew from heaven' and increased its fertility, it might be well worth undergoing trouble and expense in order to attain it. But it is not by any means every title that will be improved by registration. Herded together, as the majority of titles will be, in the common 'possessory' fold, some will by contact with their betters acquire a reputation for respectability but little deserved, others just falling short of the 'absolute' will by association with inferiors be appraised at less than their real worth. If there is one thing more undesirable than another for many titles, it is that they should be brought into the light of publicity. Peacefully reposing in the strong-room of a solicitor's office, their constitutions are strengthened and their blemishes concealed if not cured; but to drag them before an examiner with all their imperfections thick upon them, and perhaps with scanty time for preparation, savours more of the darkness of mediaeval Spain than of the enlightened England of the nineteenth century. Titles of ancient lineage which have been in the same families for genera-

tions may survive the ordeal, but many a tender youngling which under the beneficent influence of the Statutes of Limitations would have ripened to maturity will be cut off before it has reached its prime.

Hitherto the law has allowed a man to sell his land with whatever title he may have. The title of the disseisor is in this country a freehold title, and though it may be a very bad title and liable to be defeated, still it is good against all the world except against those who may be proved to have a better one[1]. But under this measure it is extremely doubtful whether a man whose only title is by adverse possession for less than twelve years can get registered at all, unless the allegation which he has to make (sect. 6, sub-sect. 1), 'that he is entitled to the land,' is to be understood with a reservation of the right of some one else to turn him out. The allegation indeed need not be embodied in the statutory declaration (sub-sect. 2), and therefore will not become a stumbling-block to persons whose consciences are tolerably easy-going.

Lastly, if any landowner is found to support this measure in the hope that after his title has survived the storms and his pocket the expense he may attain the satisfaction of finding himself the proud possessor of an absolute certificate, let him not deceive himself. Whatever an absolute title may mean, it does not mean one which is absolutely secure. It is not in the course of nature for a title to remain perfect; a discovered will, a decision of a Court of law, a dead man come to life, a trustee absconding with the legal estate, will upset the entries in the best-regulated registry, and a title which has spent more than five years of its life in becoming 'absolute' may be reduced to 'qualified' or 'possessory' or even to nothing in the course of a single day. 'Where a person satisfies the High Court that he has been deprived of any land by reason of any other person having been, on the first registration with an absolute or qualified title, registered as owner of the land, or by an entry on the register made since the first registration where the entry was made by any error on the part of the registering authority, the Court may order that the land shall be restored to that person, and that the person losing the land shall receive compensation out of the insurance fund' (sect. 50). Surely this is to impose the labour of Sisyphus on the unfortunate landowner,

αὖτις ἔπειτα πέδονδε κυλίνδετο λᾶας ἀναιδής.

What the exact value of the insurance may be it is impossible at present to judge, as the scheme in the second schedule is only in embryo, the essential parts being either in blank or left to be prescribed hereafter. That it is framed not altogether in an unkindly

[1] See judgment of Jessel M.R. in *Rosenberg* v. *Cook*, L. R., 8 Q. B. D. 162.

spirit to the landowner may be gathered from Rule B, which provides that 'the Land Transfer Board may, subject to an appeal to the Court, award compensation out of the insurance fund in the first instance, and determine' (apparently afterwards) 'whether a right to compensation has arisen.' If the Board exercise their power in a liberal-minded manner this rule is likely to work easily, and it is improbable that much additional work will be thrown upon the Court under the permission to appeal.

It is impossible to resist the conclusion that this Bill is framed on the assumption that inasmuch as some transactions have been carried through in a registry office, every transaction can be carried through in like manner. The hollowness of this reasoning is easily exposed. When two persons of average business capacity choose to carry out a sale of land through the registry, they do so because they know it can be done in that particular case, because the title is simple and the office conveniently at hand. But if the title is one which can only be satisfactorily registered after great expense, or if there is no office within easy distance, of course they prefer to do the business by the cheaper and quicker process of executing a deed. The difference between the two systems may almost be summed up thus: under the existing system it is necessary to prove that the land belongs to the man, under the proposed system the man must be proved to belong to the land. The fault of the existing system is that too elaborate proof of title is required involving unnecessary expense in time and money: this can be easily remedied by reducing the period during which title has to be shown to twelve or even six years and by protecting the *bona fide* purchaser for value instead of giving no protection even to the full title of forty years unless the Statutes of Limitations apply [1]. The fault of the proposed system is the difficulty and inconvenience of proving the man. It acts on the assumption that in every transaction the parties will attend at the office, and will be either known personally to the registrar or identified to his satisfaction. It breaks down directly it is brought into contact with the facts of life—a broken leg, absence from home, or ten miles distance from a railway station. If it is answered that these difficulties are to be met by the production of the land certificate coupled with a power of attorney, then let the necessary formalities and precautions to guard against fraud be first embodied in the Bill, let it tell us how the registrar will satisfy himself that the certificate is not stolen and the power of attorney not forged before he sanctions the payment of money from

[1] On this point the writer may perhaps be permitted to refer to the suggestion made by him in a former article in the July number of this REVIEW for 1887, p. 268.

one unknown individual to another and makes an entry which conveys away a man's land in his absence. The essence of the measure lies in its details and these ought to be embodied in the Act itself[1]. In this lies the immediate difficulty, in this the convenience of leaving everything to the hereafter of rules. But until this has been done the possibility of working the system universally without extreme inconvenience cost and loss of time may well be doubted. The fact that in other countries registration of titles has been found to answer fairly well is no argument why this country should exchange her existing system for one of registration. Readers of Sir Henry Maine's Ancient Law will remember that the course of development has invariably been from the public and formal to the private and informal mode of conducting business. We have long ago got rid of the cumbrous ceremonial by which the vendor and purchaser registered as it were the transaction in the eyes of all the neighbourhood. Experience has shown that the most convenient and therefore the cheapest form of dealing with land is that which is carried out between the parties or their agents in a private room. Already complaints are made in the colonies that their system adapted to simple cases of selling or mortgaging a square allotment or a sheep run marked on an official map does not altogether accommodate itself to the requirements of town life. No instance can be shown of a country using its land as we do ours, leasing it for building or mining, borrowing money on it for a few days for business purposes, or settling it for the benefit of children yet unborn, and carrying out all these different objects by means of registration. It will be a strange comment on the mother's attempt to reverse the course of history if her children across the ocean should at the same time seek to emancipate themselves from those fetters which she is anxious to resume.

Such is the Bill, and as such it must pass or not at all. The defects are inherent, and if they were remedied nothing would be left of the measue. The only good thing that can be said for it and with this the article may fitly conclude, is that it can easily be evaded. Three different ways of escape will readily suggest themselves to conveyancers upon a perusal of clause 3, and inasmuch as by adopting one of them the expense of stamps will be saved to landowners, it is permitted to hold out to them the hope that after all the measure may be a blessing in disguise.

HUGH M. HUMPHRY.

[1] Reference may with advantage be made to the Registry Acts for Middlesex and Yorkshire (7 Anne, c. 20, § 5, and 47 & 48 Vict. c. 54, §§ 5 & 6), embodying the most elaborate precautions before a deed will be registered, a much simpler matter than registration of title.

THE NEW ITALIAN CRIMINAL CODE.

EVER since Italy achieved her independence, the necessity has been from time to time proclaimed by successive legislatures of framing a Criminal Code, embodying in its provisions the most mature results of the scientific researches of her jurists, and reflecting, in the range of its applicability, the fulfilment of her long aspirations after political unity. The thoroughness with which this subject has been canvassed, the high standard of theoretical and practical excellence which, with a sensitive consciousness of their country's past achievements in this sphere, Italian legislators set before themselves, and also, I must add, the vicissitudes of Parliamentary life and the instability of Cabinets, have long delayed the completion of this important task. Commenced as far back as 1863 by Signor Pisanelli, author of the Italian Civil Code, the first attempt failed owing to a divergence between the Chamber of Deputies and the Senate, the Chamber having, at the instance of Signor Mancini, committed itself to the abolition of capital punishment, which the more conservative Senate wished to retain. A similar divergence manifested itself in 1868 between the Royal Commission appointed to draft a new Code and the Bench to whom that Code was submitted for their consideration, the majority of the Judges inclining in favour of the death penalty, in view of the disturbed state of certain parts of the Peninsula. In 1874 a vigorous attempt at codification was made by Signor Vigliani, the able Minister of Grace and Justice in the last Cabinet of the Right, or Moderate Liberal Party. His bill, which limited the death penalty to very few cases, was voted by the Senate; but before it came on for discussion in the Lower House, the Left, or Progressist Liberal Party, were called to office, and the task of framing the new Code was taken up by one of the greatest of contemporary jurists, the late Signor Mancini. At length, after a series of vicissitudes which it would be tedious to trace, the task has been accomplished, under the auspices of the present Minister of Grace and Justice, Signor Zanardelli, to whom Italy is likewise indebted for her admirable Commercial Code. As Signor Zanardelli says, however, in the prefatory Report to his Draft Code, echoing the words used on a similar occasion by Signor Mancini, 'the new Italian Criminal Code is not the work of any one man.' It represents the united labours of the Bench, the Bar, the legal and medical Faculties of the chief universities, and of those *savants* who have made a special

study of physiology and sociology in their bearing on crime. The penal laws of other European, and of several American States, and of Egypt have been laid under contribution with discriminating catholicity, and have been so comprehensively reviewed, together with the writings of foreign jurists, that the numerous official reports embodying these researches form an instructive encyclopaedia of comparative criminal legislation and jurisprudence. Of the outcome of these studies it is not too much to say, that the present Code amply repays all the time and labour spent upon it, and that the Italians may now congratulate themselves on possessing a body of Criminal Law second to none in Europe for technical excellence and for the loftiness of its ethical aims. At any time therefore it might well attract the notice of the legal profession in this country, whilst the attempts made recently to enact a Criminal Code for England seem to invest with a special interest this latest of continental Codes.

The Italian Criminal Code repeals, and takes the place of, the three codes, the Sardinian, the Tuscan, and the Neapolitan, which have hitherto prevailed in different parts of the country. Thus an end is put to a state of things according to which 'what is crime in one province is not crime in another, and citizens guilty of the same crime incur a different punishment, according to the place in which they have committed it.' These three codes however represent only two types, the Neapolitan Code being but a slight modification of the Sardinian. The characteristics of the latter and of the Tuscan Code are thus referred to in the learned Report accompanying the First Book of the Draft Code presented to the Italian Parliament by Signor Zanardelli, in November 1887. 'Admirable for its juridical harmony and for its grace of form, yet as regards political and religious crimes the Tuscan Code contains lamentable dispositions inspired by the anti-liberal ideas of the times when it was published (1852).' It is only due however to the Tuscans to add, that their juridical no less than their politico-economical traditions are in the main of a most Liberal character. Long before Free Trade was advocated in this country by Mr. Cobden, it had been to a large extent introduced into Tuscany under Leopold I; and about the same time, viz. in 1786, that enlightened ruler abolished capital punishment in his dominions. This will appear the more remarkable if we reflect, that our own statute-book at that time attached the death penalty to upwards of a hundred crimes, that burning for heresy was still practised in Spain, and that the then imminent French Revolution, with its Declaration of the Rights of Man, was about to produce a Code which not only retained decapitation, but also such bar-

barous punishments as branding and mutilation[1]. Restored during the reaction consequent on the Reign of Terror, the blood penalty was again abolished in Tuscany in 1847, and though once more restored to the statute-book in 1852 it was finally expunged in 1859.

Of the Sardinian Code Signor Zanardelli says:—'More imperfect in other respects is the Sardinian Code of 1859, which prevails, with a few variations for the Southern provinces, throughout the rest of Italy. This Code, whose vice of origin lies in its having followed too closely the lines of the French Code of 1810, without due regard to Italian ideas and traditions, gives effect in a more or less tempered form to the repressive criteria of the old empiricism. Hence the merely afflictive character of its penalties, and its defamatory punishments; its classification of crimes based only on the criterion of the amount of punishment, and principally with a view to determining the jurisdiction; the disproportion between crimes and punishments, the latter being marked sometimes by excessive severity, as in the case of crimes against property, sometimes by excessive lenity, as in the case of crimes against the State, against persons and against honour; and finally its admission of capital punishment which conflicts with the conception of justice as with every lofty sentiment of humanity.'

The present code is divided into three books, of which the first treats of Crimes and Punishments in general, the second of Specific Crimes, the third of Specific Contraventions. The First Book, as containing the fundamental principles which are to govern the whole criminal law of the country, has engaged the largest share of the attention of Italian jurists; and as the problems it deals with are common to the criminal jurisprudence of all countries, a brief summary of it may interest readers of this REVIEW, inasmuch as it may suggest to them points of similarity or contrast, of superiority or inferiority, between Italian and English law.

The First Book is divided into nine titles, under the following headings: (1) Application of the Penal Law; (2) Punishments; (3) Effects and Execution of Sentences; (4) Imputation and the causes which exclude or diminish it; (5) Attempts; (6) Concurrence of several persons in one crime; (7) Concurrence of Crimes and punishments; (8) Relapses; (9) Extinction of prosecutions and sentences.

Under the First of these Titles we have the definition of crimes, and their division into crimes proper (delitti), and police offences (contravenzioni); the prescription of crimes by lapse of time; *cenne* and extradition. The definition of crime belongs rather to

[1] [So did some of Bentham's proposed criminal legislation.—ED.]

the province of pure than of applied jurisprudence, and the formula laid down by the Italian legislator avowedly aims, not at scientific accuracy, but at preventing the arbitrary incrimination of actions not specifically prohibited by law under pain of punishment. The division into delicts and contraventions answers to no corresponding demarcation in English law, and differs from the classification adopted by the Napoleonic Code of 1810 and by many of the continental codes which were modelled on, or more or less influenced by it, including the Code of the German Empire. These divide crimes into crimes proper, delicts, and contraventions, according as the cognizance of the offences embraced in these three categories is assigned to a tribunal of a higher or a lower grade. The tripartite division was repudiated by the two most original Italian codes, the Tuscan and the Estense, which adopted the system of bi-partition followed by the present code. This system, the merits of which, as compared with tri-partition, have been the subject of much learned discussion at the hands of continental jurists, may recall to the English reader the division, known to our own law, of crimes into felonies and misdemeanours. Though the latter distinction, as it exists nowadays, seems to be purely arbitrary, the idea which originally underlay it, as expounded by Sir J. F. Stephen in his 'General View of the Criminal Law,' is not unlike, though by no means the same as, that which forms the basis of bi-partition, as explained by Italian jurists. 'The object,' says Sir James, 'seems to have been to include under the one name the common run of crimes, committed from the common temptations of passion; under the other the less common and definite breaches of the law, which may be summed up as violations of that general implied command to respect established rights, obey established authority, and discharge legal duties, which results from the existence of every regular Government.' The rationale of the Italian distinction is thus explained by Signor Zanardelli in the afore-quoted report: 'Delicts are such facts as produce a juridical lesion; contraventions are facts which, though possibly innocent *per se*, yet endanger the public safety or the right of another. In delicts the law says, e. g. "Do not kill." In contraventions: "Do nothing which may endanger the life of another." In the former it says: "Do not damage the property of another." In the latter: "Do nothing whence damage may accrue to another's property."' It follows, he goes on to say, that delicts, as direct violations of public or private rights, are themselves either public or private, and may give rise, when the latter element preponderates, only to private prosecutions. Contraventions on the other hand, though mediately they may violate public or private rights, are always immediate viola-

tions of the ordinances established as safeguards of those rights, and hence can only be public in their nature and be prosecuted *ex officio*.

The distinction between delicts and contraventions is similarly set forth by Signor Mancini in his exhaustive report laid before Parliament in 1876; and it is illustrated by examples which serve to show how this system of classification enables the legislature to proportion punishments to the evils of the first order which result from given offences, without at the same time placing those offences in the same category with others sanctioned by the same punishments, but which are essentially different in their nature, and excite in a very different degree the reprobation of right-minded people. 'Certainly,' he says, 'the thief who steals a few *centimes* from another man's pocket, and who commits a true and proper delict, may be sufficiently punished with a few days' imprisonment; whilst a much severer punishment may well be meted out to one who, e.g. by neglecting certain precautions creates the danger of a grave railway disaster, or yet to one who during the prevalence of an epidemic contravenes some sanitary regulation established in the interests of public health.' As instances of the absurdities to which the opposite system leads, he points out that the French and Sardinian codes class vagrancy and illicit mendicancy, having regard to the *correctional* punishments by which they are sanctioned, together with crimes and delicts, as if they were of a kindred nature with murder or forgery; whilst petty thefts and assaults rank merely as contraventions, because visited merely with *peines de police*.

The tripartite classification, which in Germany has been opposed by Berner, Mittermaier, Bauer, Heinze, and other leading jurists, has been condemned by nearly all the leading exponents of Italian jurisprudence from Renazzi and Carmignani to Paoli and Carrara. Rossi went so far as to stigmatize the French system as an outrage on justice and the apotheosis of legislative despotism. By it the legislator appeared to him to say to the public, 'Disregard the true nature of human actions; look to the executive power; and if it cuts off the head of a man, be satisfied that man was a monster.' Without going so far as this writer, we may admit that a classification based on the intrinsic nature of offences, satisfies and educates the moral sense of mankind better than one which has reference only to the jurisdictional limitations of the several orders of tribunals. As Gibbon remarks with no less truth than epigrammatic force, 'A sin, a vice, a crime are the objects of theology, of ethics, and of jurisprudence; whenever their judgments agree they corroborate each other.' Something of this corroborative efficacy seems to attach to a

classification which distinguishes between crimes which are everywhere stigmatized as such by the human conscience, and offences which are only punished by the state for preventive purposes, and in the interests of individual and social security. Among delicts proper a further distinction is drawn by the Code between such as are of a political character, and such as are prompted by mere base impulses; but this subdivision will be noticed later on.

Next in order are the provisions concerning *venue*, or more strictly 'the efficacy of the Penal Law with respect to locality,' and extradition. The Common Law principle that crimes are local, and that with a few exceptions the cognisance of them belongs exclusively to the Courts of the country where they were committed, does not, as Wheaton points out, obtain in countries whose jurisdiction is founded on the Civil Law. The Italian legislator nominally admits the *territoriality* of the Penal Law, but by an ingenious interpretation of this term, he, to a great extent, superadds to its ordinary significance that of extra-territoriality. 'If,' says Signor Zanardelli, 'the title of the State to exercise punitive power is derived from the *crime*, it is likewise true that the exercise of that power has for its object the detection, conviction, and condemnation of the *criminal*. It therefore stands to reason that the territoriality of the Penal Law should apply not only in respect of *facts* committed within the territory, or of *noxious effects* directly prejudicing the national State, but also in respect of *persons* commorant in the territory, wherever they may have committed the crime, inasmuch as their impunity is a menace to the social security of the State in which they reside.' Whatever may be thought of this argument, experience has shown that our strict construction of territoriality may lead, in cases where extradition does not apply, to the impunity of the criminal. The cognisance of crimes committed out of the territory is, however, limited by art. 4 of the Code to the cases expressly enumerated by law. The principal are as follows:—Under art. 5 subjects and aliens may be prosecuted, even in their absence, for crimes against the safety of the State, forging the State seal or certificates of public stock or instruments of public credit, or counterfeiting the coin of the realm, if in each case such offences are punishable with more than five years' imprisonment. Except in these cases residence is necessary to confer jurisdiction. Its limitations vary according as the accused is a subject or an alien, and as the party injured is the State or one of its subjects, or an alien. As a subject, according to art. 9, can never be surrendered for trial to a foreign State, his trial within the national territory for crimes punishable, according to both laws, with at least three years' imprisonment, is rendered compulsory by art. 6. The same applies in the case of an alien if

the crime was committed against the Italian State or one of its subjects. Otherwise the prosecution of an alien is optional, subject to the conditions(1) of the crime being comprised in an extradition treaty, or of its being against the law of nations, against the person, against property, against *bonos mores*, or an act of fraudulent bankruptcy; (2) to his extradition not having been accepted either by the State in which he committed the crime, or by the one to which he owes allegiance. It is further optional with the Government in these cases, either in default of, or after, prosecution and punishment, to expel the alien. Save as regards cases under art. 5, the more lenient of the two laws is to be applied in the prosecution of crimes committed in a foreign State; and proceedings are to be stayed on proof of previous acquittal or conviction and expiation of sentence in such State. I have already alluded to the provision of the Code which prohibits the extradition of subjects; a prohibition based, not on principle, but, as Signor Zanardelli's Report informs us, on considerations of present expediency, which may lose their weight with the growth of mutual confidence between States, and the increased similarity between their penal institutions. The interdiction on the other hand of the extradition of aliens for 'political crimes or crimes connected with the same,' is declared to be one which Italy is bound to guard all the more jealously, inasmuch as, in the past, so many of her best sons had to avail themselves of the asylum afforded by other States to her political refugees.

The second title, which treats of punishments, brings into prominence one of the most radical differences between Italian and English Criminal Law. England is the most conservative country in Europe in the matter of capital punishment. In Italy it has since 1876 been abolished *de facto*, and by the present Code it is abolished *de jure*. This is the first instance of a great European State entering uncompromisingly on the path of abolition, without even excepting high treason or parricide. The result will be followed with interest in other countries, and if the anticipations of Italian jurists are justified by the event, and the present high rate of homicidal criminality continues to show a tendency to diminish rather than to increase under the abolitionist *régime*, it will constitute the strongest argument which has yet been advanced against capital punishment.

The considerations which determined its abolition are summarized with admirable clearness by Signor Zanardelli's Report, which traces the progress made throughout Europe by that reaction against wanton cruelty in the punishment of criminals, which received its chief impulse from Beccaria towards the close of last century. That great reformer, in his classic work 'On Crimes and

Punishments,' stigmatised capital punishment as 'depravatory,' declaring it to be absurd that the law should avenge homicide by itself perpetrating homicide; and that in order to deter citizens from assassination it should present to them the debasing spectacle of a public assassination. The death penalty, says Signor Zanardelli, imitates in its essence one of the most atrocious crimes with which a man can stain his hands, that of extinguishing the life of a fellow-man; and it does so with a cold deliberation which prolongs and enhances the agony of its victim. Such a punishment he considers calculated to blunt the best sensibilities of mankind, and even to diffuse homicidal mania and criminal ebriety. To the argument based on the *par excellence* deterrent efficacy of this punishment, he replies that the most atrocious criminals are often the most fearless of death; that men who lightly take the life of another are apt to reck as lightly of their own; and that in the words of Seneca, *Multi sunt qui mortem ut requiem malorum contemnunt et graviter exparescunt ad captivitatem.*

Another argument urged by Italian abolitionists is the irreparable character of this punishment. In countries like Italy, where appeals lie from the Assize Courts, the statistics of quashed convictions and reduced sentences form a striking comment on the fallibility of human judgments. Among the data illustrating the same liability to err on the part of foreign tribunals, an Italian Parliamentary Report mentions the cases of two Italians sentenced to be hung in 1865, the one in London, the other at Swansea, both of whom were subsequently proved to have been innocent.

The contention that this penalty is not necessary as a social safeguard is to some extent confirmed by judicial statistics covering a period of seven years, viz. from 1880 to 1886, during which time the indictments for 'qualified homicide' tried at the Assize Courts diminished from 943 in the first year to 796 in the last.

The examples of Portugal and Holland, which have abolished capital punishment *de jure*, as well as of several other European States which have dispensed with it *de facto*, afforded encouragement and incited to emulation; but the consideration which outweighed all others with Italian legislators was, that to *retain* the death penalty in the new Code meant, as regards Tuscany, to *restore* it to the statute-book; a course which would have been unjustified by the long experience of abolition in that province, and which public opinion would have resented. For not only in this 'garden of Italy,' but throughout the Peninsula, public opinion, formed largely by the teaching of jurists of profound learning and broad humanitarian views, such as the late Signor Mancini, Professor Carrara, and Senator Pessina, is strongly opposed to executions; and though

it has for years tolerated their nominal retention, would have uncompromisingly resisted their re-enactment.

The extreme penalty sanctioned by the new Code is perpetual imprisonment in its most aggravated form. The name—*ergastolo*—if not suggestive to the popular mind of the horrors of a Roman slave-prison, is associated with the hardly less drastic traditions of Bourbon rule in Naples. In her poem on Baron Nicotera's imprisonment in 1858, in the tower of Favignana, the late Mrs. Hamilton King characterises the *ergastolo* of those days as

> 'An evil name,
> An evil thing, a hell on earth,
> Wherein no whisper evermore
> Of hope shall enter.'

The *ergastolo* of modern Italy will not be altogether such a dire abode. 'Stripes,' and 'the weight of irons' will form no part of its discipline. Due regard will be paid to the hygiene of these sombre establishments. But after all they will be little better than living tombs. Cut off from all human intercourse, doomed to silence and solitude, alike by night and in the performance of his daily task, the prisoner will there drag out a miserable existence, which may well make death appear to him as a *requies malorum*. But though perpetuity is the distinguishing feature of this punishment, the extremity of its rigour is limited to a period of ten years. At the end of that term, the prisoner 'whose conduct has been good' is admitted to work in common with other prisoners of the same class. This slight alleviation of his lot, says Signor Zanardelli, is counselled 'less by a sentiment of humanity and the expediency of rewarding good conduct, than by the interests of discipline,' which could not be maintained in these establishments, were the prisoners bereft of all hope, however remote, of the mitigation of their terrible punishment. In certain cases, too, where the physical or mental condition of the prisoner may render continual solitary confinement absolutely intolerable, regulations, to be issued under art. 44 of the Code, will provide for its determination even before the expiry of the ten years. But even thus mitigated, the *ergastolo* is so drastic a punishment that in the recent discussion on the Code, in the Italian Chamber of Deputies, some speakers condemned it as worse than the capital punishment for which it is substituted; and we may anticipate that, in many cases of the gravest crime, juries will endeavour to avert this penalty by finding extenuating circumstances. This contingency is provided for by art. 56 of the Code, which enacts that where a crime punishable with the *ergastolo* is found to have been committed under extenuating circumstances, the sentence to be passed is 'reclusion' for thirty years.

Before proceeding to explain what 'reclusion' is, it seems advisable to set forth the fundamental principles which regulate the punitive system contained in the Code. This system is characterised by the same regard for ethical distinctions and aims, which, as I have endeavoured to show, dictated the division of crimes into delicts and contraventions. Corresponding with this division we have two classes of punishments, each of which comprises punishments varying widely in the degree of their severity; so that a delict, however grave or however trifling, can always be visited with a proportionate punishment of the one class, whilst the other class provides equally adequate punishments for contraventions of every degree of gravity. The punishments sanctioned by art. 10 of the Code for delicts are seven, viz. the *ergastolo*, reclusion, detention, *confino*, local exile, interdiction from public offices, and fines. Those for contraventions are of three varieties: *arresto*, *ammenda*, and suspension from the exercise of a profession or trade.

It will be observed that corporal punishment finds no place in these lists. Even under the codes lately in force in Italy, though sanctioned, it was never applied, whilst, as Signor Zanardelli says, it has been abolished by the laws of all the most civilised countries in Europe—with the exception, he might have added, of England—as 'derogatory to human dignity, ineffectual, and demoralising.' Of the above-enumerated punishments six are restrictive of personal liberty, two are pecuniary, and two affect public or private rights. Having already discussed the subject of *ergastolo*, I may remark that reclusion, detention, and *arresto* are forms of imprisonment differing as to the establishments in which they are expiated and as to other incidents. Reclusion and detention are intended to be 'parallel' punishments, i. e. they both range in duration from three days to twenty-four years, and are both applicable to crimes of the same degree of gravity. But they are marked by differences in the prison discipline, which are determined by the different purposes these two forms of confinement are intended to subserve. These purposes in turn vary according as the nature of the crime indicates that the delinquent needs a reformatory punishment, or that only a repressive and preventive punishment is called for. As a rule the former is the case. Generally crime is equally a breach of law and of morality; the motive of the delinquent is as wicked as his act is illegal. But sometimes crime is unaccompanied by moral depravity. The law violated may be one which is better honoured in the breach than in the observance, such as laws restricting liberty of conscience; or the *malum* prohibited by the law may be *malum* only *quia prohibitum*; or finally the *malum*, though *malum in se*, may have been committed, under the influence of some

mental aberration, from motives in themselves praiseworthy. In these cases a severe reformatory prison *régime* would serve no useful purpose. All that justice requires is that the delinquent should be rendered harmless for a sufficiently long period, and suffer such restriction of his liberty as may deter himself and others from repeating the offence. This principle, though theoretically sound, is very difficult to carry out in practice. The Italian Code however makes a praiseworthy attempt to do so. It distinguishes between on the one hand 'the common run of crimes,' as Sir J. F. Stephen calls them, or to use Signor Mancini's description, 'crimes committed from perversity or abjectness of soul,' and on the other hand 'political or press offences, and all those crimes involving no dishonour to which the delinquent is impelled by the force of his affections.' In his Draft Code of 1876, Signor Mancini went further than the present Code in giving effect to this distinction, leaving it to the judge's discretion to award detention whenever a crime punishable with reclusion was in the particular instance prompted by a 'generous impulse.' Under a salutary dread of sentimental verdicts, and fearing furthermore that a punishment declared to be awarded for crimes committed from 'generous impulses' would have dangerous attractions for notoriety-hunters, Signor Zanardelli eliminated this general discretion, and adopted the more cautious course of specifying the particular crimes for which the milder form of punishment is to be awarded, 'leaving it to the judge, only by way of exception and in determined cases, to investigate the nature of the delinquent's impulse with a view to awarding the one or the other kind of punishment.'

The punishment of reclusion is regulated by articles 12 and 13 of the Code. They prescribe that when the term awarded does not exceed one year, it is to be expiated in a judicial prison, with the obligation of labour and continuous solitary confinement. The severity of this latter disposition is mitigated in some measure by the further provision that 'two days of solitary confinement are to count as three days of punishment,' so that the term comes to be reduced by one-third. When the term exceeds one year it is to be expiated in a *casa di forza* (house of force), a name given to such establishments for the sake of the wholesome awe it is supposed to inspire. In this case solitary confinement is limited to the first part of the term, being one-sixth of the whole; but it must not last for less than six months nor for more than three years. Labour is compulsory during the whole term; so too is silence during the latter part of it, when the labour is performed in association, the prisoner being shut up in his cell only at night. When the term of reclusion amounts to not less than five years, the prisoner whose

conduct during half his term has been good may be permitted to expiate the remainder in an intermediate agricultural or industrial penitentiary establishment; or he may even be engaged in public works, but always 'under the vigilance of the public Administration.' This privilege is revocable for misconduct. Detention, as remarked above, is expiated in separate establishments. There is no period of solitary confinement; the prisoners work in association, and are entitled to choose among the various branches of work furnished by the establishment the one they prefer. They may indeed, within certain limits, choose an altogether different kind of work, better suited to their tastes and capabilities.

It will be observed that, though the Italian law in a general way differs so widely from our own, the framers of this Code have, at least in one respect, paid us the flattering tribute of imitation. The system of so ordering the punishment of prisoners as to appeal to their better qualities, which was brought to such perfection in Ireland by Sir W. F. Crofton, as to excite the admiration of men so diverse in temperament as Cavour, Helmholtz, and Mancini, has admittedly been taken as the model of the Italian system of prison punishments. Here, very much as in the Irish system, the initial term of solitary confinement, succeeded by one of associated labour, the intermediate penitentiary establishment, and the grant of conditional liberty, form a series of progressive stages in which, as regards diet, wages, enlarged communication with his fellows and with the outer world, in a word, as regards his whole manner of life, the prisoner reaps the advantages of a steady course of good conduct, whilst his amendment is further promoted by the ministrations of religion, by secular instruction, and by a careful attention to his hygienic requirements. Whilst Italy has thus borrowed from us, it may not be irrelevant to recall the fact that the prototype of our model prisons, arranged on the radiating plan with separate cells, was furnished by the *Ospizio di S. Michele* in Rome, built by Pope Clement XI. in 1703; which establishment, together with the *Pia Casa di Rifugio pei Fanciulli Poveri*, opened in Florence by the Abbate Franci in 1677, afford probably the earliest instances of detentive institutions based on the principle of useful compulsory labour.

The terms on which conditional release may be obtained are set out in art. 15. The original sentence must have been not less than three years' detention or reclusion. In the former case at least half the term must have been expiated; in the latter case three quarters. Finally the prisoner must 'have given proofs of amendment,'—a somewhat vague expression. Certain graver crimes are excluded from this benefit, such as conspiring with four or more

persons to commit crimes, extortion, rapine and abduction, and those crimes which, though punishable with the perpetual *ergastolo*, have, owing to extenuating circumstances, been visited with thirty years' reclusion. Relapsed criminals labour under further disabilities in this respect, according as their offences are of a graver or more venial nature, and as they have repeated them once or more often.

The fourth form of prison punishment, *arresto*, is regulated by arts. 23 and 24. It is awarded only for contraventions, and may extend from one day to two years; labour is compulsory, but there is no solitary confinement. Power is given to the judge in cases of venial contraventions committed a first time, and not involving more than a month's arrest, to allow the offender to expiate it in his own house. This mild form of carceration traces its origin to the provision in Justinian's Digest empowering the *Praeses* to '*quemdam damnare, ne domo suo procedat.*' It appears in the Austrian Code of 1852 under the name of *Hausarrest*, and in one at least of the Swiss codes. Its peculiar advantage is that it exempts the prisoner from the shame, so deleterious to his self-respect, of detention in a public penal establishment; and that it saves him from the risk, ever present in such establishments, however well regulated, of moral contamination. Its chief disadvantage lies in its unequal pressure on rich and poor. To the former it may mean a period of idle and luxurious self-indulgence; to the latter starvation. Another substitute for *arresto* in certain cases determined by law is the execution of works of public utility, a form of punishment advocated at the International Penitentiary Congress held in Rome in 1885, by among others Holtzendorf, Nocito, and Pierantoni.

Of the seven species of punishments established by art. 10 for delicts, four still remain to be noticed, viz. *confino*, local exile, interdiction from public offices, and fines. The first of these consists in the obligation to reside for a term of not less than one month and not more than three years in the commune specified in the sentence, and which must be situated at a distance of not less than sixty kilometres from the one where the crime was committed, and from those in which the delinquent and the parties he may have injured respectively reside. This punishment is awarded for challenging to fight a duel, and for a few other offences which, though not considered grave enough for imprisonment, render it expedient in the interests of public order to remove the offender from the scene of his transgression. Local exile is the same in principle; but the sentence in this case does not restrict the offender to one commune; it merely prohibits him from approaching within twenty

kilometres of those from which it is expedient to keep him at a safe distance. Interdiction from public offices, according to art. 18, may be perpetual or temporary. It involves the forfeiture of the parliamentary franchise, 'and of every other political right,' of employment in the civil service, of academic degrees, of ecclesiastical benefices, of the rights of guardianship, and many other privileges. The punishment of *multa* consists in fines ranging from 10 lire (8*s.*) to 10,000 lire (£400), with the alternatives of detention, at the rate of one day for every 10 lire (in no case however to exceed one year), or of the execution of some work in the service of the State, the province, or the commune. The kindred penalty of *ammenda* ranges from one to 2000 lire, with similar alternatives, except that *arresto* is substituted for detention. The suspension from the exercise of a trade or profession, which closes the list of punishments sanctioned under this title, ranges between three days and two years.

The next Title, which treats of the execution and effects of penal sentences, does not call for special notice. I may mention however that among the effects of graver sentences is the loss of *patria potestas*, marital authority, and testamentary capacity. The judge may likewise, on the application of the party injured, order restitution to be made and award damages.

The Fourth Title treats of 'Imputation and the causes which exclude or diminish it.' The fundamental maxim that only a voluntary act or omission can be treated as criminal, is common to the Italian law and to our own. Not so the provision immediately following this one in art. 46 of the Draft Code. 'With respect to delicts,' it says, no one can be punished for a fact if he prove that he did not intend it to be the consequence of his act or omission, unless the law expressly lays such consequence to his charge.'

'It does not suffice,' says Signor Zanardelli, 'to lay down the principle that there is no crime without a voluntary act or omission. The cause may be voluntary, whilst the effect is involuntary. And the effect which was not intended must not and cannot be imputed, except in those cases where the law expressly holds the party responsible for an effect which was not, or may not have been, intended.' These exceptions however are not arbitrary; the consequence for which the law expressly holds the party criminally liable is a consequence which he might have foreseen. An instance of such an exception to the general rule, where the incriminated consequence is due to *culpa*, is furnished by art. 106, which authorises the punishment of an official through whose negligence or imprudence a secret or document affecting the safety of the State, and entrusted to his keeping, is divulged. Art. 104 contemplates

the disastrous consequences which may ensue from the active betrayal of such secrets or communication of such documents, and sanctions, in the event of such *dolus* 'contributing to the disturbance of the friendly relations of the Italian State with some foreign Government,' a severer punishment than would be warranted by a betrayal attended by no such evil results to the country.

The Italian doctrine that to constitute a specific crime there must have been the intent to commit that crime, may seem to the lay mind a truism; but it certainly did not commend itself to the acceptance of our older jurists. '*A* shooteth at the poultry of *B*, and by accident killeth a man; if his intention was to steal the poultry it will be murder by reason of the felonious intent; but if it was done wantonly and without that intention it will be but barely manslaughter.' Such is the sapient conclusion arrived at by the doctrine of a 'felonious design or intention in general.' Given an act animated by a felonious intent and followed by a disastrous consequence, the intent to produce such result is treated as a presumption not *juris tantum*, but *juris et de jure;* and this whether or not such result was the probable consequence of the act in question, and whether or not the agent was ignorant of some matter of fact, without the concurrence of which such result would have been impossible. Commenting on this rule, which makes every felonious intent 'malicious,' Sir J. F. Stephen, in his 'General View of the Criminal Law,' says that 'its inconvenience arises from the unmeaning nature of the distinction between felonies and misdemeanours.' But is this all? Does not rather this 'unmeaning distinction' bring out more forcibly the intrinsic unreasonableness of the rule itself? On the other hand, the formula of the Draft Code, though endorsed by the Commission of the Chamber of Deputies, was adversely criticised by the Commission of the Senate. To throw on the accused the onus of proving in all cases that he did not intend the consequences which have occurred, they considered oppressive; whilst to admit him to prove that he did not intend the necessary or probable consequences of his actions was in their opinion calculated to defeat the ends of justice. They therefore modified art. 46, by eliminating all reference to the consequences of acts or omissions actuated by *dolus*, and leaving it to the special part of the Code, which defines individual crimes, to specify, where necessary, the knowledge of matters of fact necessary to constitute such crimes.

The grounds of exemption, total or partial, from criminal responsibility, form one of the most debateable fields of jurisprudence; and until the progress of forensic medicine shall have furnished us

with more reliable data than we at present possess, as to the workings of the human mind and the extent to which these are affected by morbid conditions of the body, it will hardly be possible to lay down rules which shall reconcile the claims of mercy and of justice. In Italy a new school of jurisprudence, calling itself the *scientific*, as distinguished from that which continues the *classic* traditions of Italian jurisprudence, has devoted much attention to this subject. By a minute analysis of statistics and of physiological and sociological phenomena in their bearing on crime, this school, of which Professor Lombroso and the deputy Signor Ferri are the leading exponents, has arrived at results which well-nigh dispense altogether with the conception of criminal responsibility, and represent man as the helpless sport of volitions determined by the physics of his brain and the accidents of his environment. Thus the moral basis of punishment disappears, and all that remains is the necessity for society to defend itself against dangerous and noxious members. Punitive justice, as Signor Pessina graphically puts it, becomes 'a struggle between society and the delinquent, similar to that waged in the forest between primitive man and the wild beasts.' These views are ably advocated in the literary and academic arenas, and are influencing widely the rising generation; but the discussions on the Criminal Code in the Chamber of Deputies last summer showed that the older Italian school of jurisprudence, which recognises the freedom of the will and the moral element in human actions, whilst at the same time doing justice to the extrinsic factors of crime, is still paramount in the legislative forum.

But even this latter school is not unanimous in the answer it gives to the question: What states of mind render an action, otherwise a crime, dispunishable? The Sardinian Code, in this as in other respects, has followed the French Code of 1810, which enacts, art. 64: 'Il n'y a ni crime ni délit, lorsque le prévenu était en état de démence au temps de l'action, ou lorsqu'il a été contraint par une force à la quelle il n'a pu résister.' The formula of the Tuscan Code is admirable for its elegant conciseness and comprehensiveness, and has generally been regarded by Italian jurists as approaching more nearly than any other to scientific accuracy. It is contained in art. 34, which runs as follows: 'Violations of the Penal law are not imputable when the person who committed them did not possess the consciousness of his acts and liberty of election.' This formula appears to have been followed by the German Code of 1870, which enacts, § 51, 'There is no criminal act if the author was at the time he committed the act in a state of unconsciousness or morbid disturbance of the activity of his mind, through which

free volition on his part was excluded.' It will be observed that the German clause requires the absence of free will to be due to morbid affections of the mind. However valuable as a scientific formula, the Tuscan enactment, framed before trial by jury was introduced into that State, is rather fitted to perplex than to enlighten the average lay judge. As for the French formula of a force which the delinquent 'n'a pu résister,' adopted by the Sardinian and Neapolitan Codes, it has often led to the most scandalous acquittals. The more atrocious the crime, the more plausible the plea that the agent was carried away by the uncontrollable impulses of passion. And thus, as has been sarcastically remarked by Italian critics of this formula, criminal responsibility stands in an inverse ratio to criminal enormity. To remedy these abuses some of the codes drafted during the last twenty years restricted this immunity to cases of *external* force or compulsion. But this limitation was censured by Signor Mancini in the prefatory Report to his own code of 1876, in which he argued that the father who kills his daughter's seducer may be acting in obedience to an *internal* impulse as utterly *irresistible* as any *external* force. But surely in the case put by Signor Mancini the circumstance which militates in the father's favour is not his impotence to control the fierceness of his passion. That plea might be urged with equal truth by the constitutional and habitual firebrand, who on the slightest provocation is seized with a paroxysm of homicidal frenzy. In fact, as the Naples Court of Cassation wrote, commenting on Signor Mancini's Draft Code, 'in all crimes which have not pleasure or profit as their object, such as homicidal crimes, the delinquent acts in obedience to a force which he cannot resist.'

Signor Zanardelli has endeavoured to guard against the abuses incidental to the popular interpretation of the *vis major cui resisti non potest*. In art. 47 of his Draft Code he thus states the grounds of exemption on the score of mental infirmity: 'No person is punishable who at the time of committing the fact was in such a state of deficiency or of morbid alteration of mind, as to deprive him of the consciousness of his acts or of the possibility of acting otherwise.' This formula was not approved by the Commission of the lower house, but as they were unable to suggest a better, they left it to the Minister to amend it in the final text of the Code. The Commission of the Senate were more definite in their strictures and more practical in their suggestions. They rejected the term 'deficiency of mind,' i.e. of mental power, as expressing too vaguely the condition of mental imbecility. They likewise rejected 'the impossibility of acting otherwise,' as a looser phrase, and more liable to misconstruction than the 'irresistible force' it was meant

to supersede. The clause in question was therefore recast by them as follows: 'No person is punishable who at the time of the action or omission was, owing to permanent or temporary infirmity of mind, in such a state as not to possess the consciousness or the liberty of his acts.' The last limb of this clause may be regarded as an improvement; but it seems doubtful whether the term 'mental infirmity' is sufficiently comprehensive to include, on the one hand, such instances of deficiency of mental power as somnambulism and incomplete mental developement, and on the other the multifarious forms which may be assumed by morbid derangement of the mental faculties. Besides the grounds of exemption set forth in art. 47, art. 50 of the Draft Code recognises as 'grounds of justification': (1) the execution of the law, or of the command of a competent authority; (2) lawful self-defence; (3) 'the state of necessity.' The first of these exceptions is based on the principle, '*In damnum dat qui jubet dare; ejus vero nulla culpa est cui parere necesse est.*' With reference to the second I need only remark that it extends to the defence of 'others' as well as oneself. The third exception is constituted by 'the necessity of saving oneself or others from a grave and imminent danger to the person, not occasioned by oneself, and which could not otherwise have been averted.' The difference between this and the preceding ground of justification, is that the latter contemplates resistance to an aggressor; the former takes into account the conflict created by fortuitous circumstances between the rights of two parties. This doctrine of the right of preserving one's own life at the expense of that of an innocent party, is of doubtful expediency and of more than doubtful morality. It has long held a place in our text-books, illustrated by the hypothetical case, quoted likewise by Italian writers, of one drowning man pushing another off a plank, which could only bear one person's weight. An American Court has upheld this doctrine in the case of an overcrowded boat, with the curious limitation that the crew should have drawn lots to decide who were to be the Jonahs. Happily as regards this country, the case of *R.* v. *Dudley & Stephens*, 14 Q. B. D. 273, where two survivors of a shipwrecked crew were tried for murdering and feeding on one of their number, 'the tyrant's plea, necessity,' was disallowed by the Court for Crown Cases Reserved, and was condemned in language of stern eloquence by the present Lord Chief Justice. Signor Zanardelli's clause respecting the 'state of necessity' seems to have been borrowed from the German Code (§ 54); but the Commission of the Senate objected to it as liable to grave abuse, and substituted for the last quoted article, as an addition to art. 47, the clause: 'The person is likewise not punish-

able who acted in a state of compulsion, due to an external cause, which deprived him of the liberty of his acts.' I may add that where the abnormal or morbid condition of mind, or the external compulsion, is not sufficient to exclude, it may diminish responsibility, under other provisions contained in this title.

Conformably with the traditions of Italian jurisprudence, the Code makes much greater allowance than our law for drunkenness, as diminishing or excluding responsibility. Aretino, Deciano, Caravita and other Italian writers were among the first in Europe to point out the irrational character of the draconian enactments which, from Charlemagne to Innocent III and Francis I, were devised in the Middle Ages for the punishment of crime committed under the influence of spirituous drink. Following in their wake, Cremani, Carmignani, Renazzi, as well as all the modern jurists, estimate this ground of exemption according as the state of drunkenness is complete or incomplete, habitual or casual, accidental, voluntary or premeditated. The only instance in which this plea is admitted by Sir J. F. Stephen in his 'General View of the Criminal Law,' viz. where the party has been drugged, is not noticed in this connection by Italian writers, who regard ebriety thus contracted, not as a special ground of exemption, but as falling within the general principle that where the material agent fulfils throughout unconsciously the criminal purposes of another's will, such agent commits no crime, because *non agit sed agitur*. Taking then the provisions of the Code, we find that accidental drunkenness, like mental infirmity, excludes or diminishes responsibility, according as it wholly or partially impairs the faculties of thought and will. Habitual drunkenness can only diminish responsibility in varying degree. On the other hand, responsibility is neither excluded nor diminished by premeditated drunkenness, contracted of set purpose by the cowardly ruffian to nerve him to his fiendish deed.

As regards age, it is worthy of remark that this Code, framed for a country where physical and mental development are more precocious than in this colder clime, nevertheless fixes the limits of criminal responsibility later than is the case with our law. Infancy is protracted to the comparatively ripe age of 9 years, and affords an absolute defence. Between the ages of 9 and 14 'discernment' (corresponding to our 'guilty knowledge') must be proved; failing which the youthful criminal can only be sent to a reformatory, or consigned to his parents, they being bound over to take proper charge of him. On proof of 'discernment' criminal responsibility attaches; but punishment is applied according to a reduced scale. No special proof is required between the ages of 14 and 18; but the scale of

punishments, though increased as compared with the preceding standard, is still inferior to that established for full manhood.

Title V treats of attempts to commit crimes, a subject respecting which very precise and methodical rules have been laid down by Italian jurists. Romagnosi was the first writer who drew a distinction between attempted and abortive crimes (*reato tentato e reato mancato*). The essentials of the former are: the intention to commit a crime; its inchoate execution by means of acts adapted (*idonei*) to the purpose; and the fact of its consummation being prevented by fortuitous circumstances independent of the agent's will. To constitute the graver species of *reato mancato*, the evil intended must have been averted by some fortuitous circumstance, but the crime attempted must have been, as far as the acts of the agent are concerned, absolutely brought to completion. As illustrations of *reato mancato*, Signor Mancini in his Report gives two hypothetical cases. *A*, with intent to kill *B*, fires a loaded gun at him, at a short range and with steady aim. The ball strikes *B* full in the chest, but a medal worn by *B* underneath his dress prevents the projectile penetrating. Or *A*, with a similar intent, throws *B*, who does not know how to swim, into a deep and rapid stream, in which he must have perished but for his rescue by an expert swimmer. The distinction between *reato tentato* and *reato mancato* rests, it will be observed, on an essential difference. *Reato tentato*, where the execution of the series of acts directed to the consummation of the crime intended is interrupted, involves a lesser degree of moral depravity; for *non constat* that the agent would, if uninterrupted, have persevered to the end in his criminal design. The danger and consequent alarm caused by his action are also less than in *reato mancato*. Nevertheless this distinction appears to be ignored as well by our own law as by the codes of Germany, Hungary, Belgium, Holland, and of several other continental countries. In other respects the Italian law on this subject, though perhaps formulated with greater precision, appears to correspond with our own. Unlike many of the continental codes, the Italian gives effect to the principle laid down by Cockburn C.J. in *R.* v. *Collins* (33 L. J. M. C. 177) that 'an attempt to commit a felony can only in point of law be made out, where if no interruption had taken place the attempt could have been carried out successfully.' As to what acts done in furtherance of a crime will support a conviction for an attempt to commit that crime, Italian jurisprudence lays down the rule that such acts must be *executive* and not merely *preparatory*. Whether or not this rule holds good in English law is not quite clear. In his Digest of the Criminal Law, p. 37, Sir J. F. Stephen gives as an instance of an attempt the following illustration: '*A*

procures dies for the coining of bad money. *A* has attempted to coin bad money.' Here the act was only preparatory; and indeed in the case referred to by Sir J. F. Stephen (*R.* v. *Roberts*, 25 L. J. M. C. 17), the Court held that there was 'no direct attempt to coin,' and hence no 'attempt to commit the statutable offence.' But at the same time they held that there was a 'criminal intent coupled with an act.' 'I will not,' said Jervis C. J., 'attempt to lay down any rule as to what is such an act done in furtherance of a criminal intent as will warrant an indictment for a misdemeanour; for I do not see the line precisely myself.' Comparing this decision with one delivered, on similar facts, by the Roman Court of Cassation, 3rd February, 1879, it appears that, by different lines of reasoning, English law and Italian law arrive at the same practical results. Neither law regards preparatory acts as constituting attempts; but our law fastens on the 'criminal intent coupled with an act;' and the Italian law punishes those guilty acts which fall short of attempts as 'crimes *sui generis*.'

The above-mentioned provision of Italian law, that the complete execution of the series of acts must be prevented by fortuitous circumstances *independent of the agent's will* may seem to be at variance with Sir J. F. Stephen's rule, that 'the offence of attempting to commit a crime may be committed in cases in which the offender *voluntarily* desists from the actual commission of the crime itself.' But under the circumstances of the case referred to by Sir James (*R.* v. *Taylor*, 1 F. & F. 511), where a man about to set fire to a haystack blows out his match on perceiving that he is observed, the forbearance to apply the match would not, according to Italian jurisprudence, be considered voluntary. Voluntary desistance, according to Signor Mancini, must be determined by an 'impulse of repentance.' The agent must at the time have it in his power to proceed with or to abandon the execution of his criminal design; he must not have adopted the latter course merely 'because he has encountered, or there have supervened, physical or moral causes which obliged him to suspend or abandon such execution.'

The punishment sanctioned by the Code for attempts varies according as they belong to the higher or the lower category already noticed; the diminution as compared with the completed crime ranging from one-half to two-thirds in the case of *reato tentato*, and amounting to only one-sixth in the case of *reato mancato*.

The principle *quot injuriae tot et personae injuriam facientium* underlies the provisions contained under Title VI, which govern the participation of several persons in one crime. Here, whilst eschewing technical terms, as indeed it does throughout, the Code gives

effect to the distinctions drawn among such parties by Italian jurists, which are expressed by the terms of principal, intellectual author, auxiliator, accomplice, favourer, and sundry others. The principal division however is, as in our own law, into principal and accessory. But whilst the Italian law is in some respects more rigorous in determining what constitutes a principal party to a crime, on the other hand it always punishes the accessory less severely than the principal. The species of participation it contemplates are threefold: 1. Actual perpetration of the crime; 2. Determining another person to commit a crime without taking part oneself in its actual perpetration; 3. Aiding the commission of the crime. The first of these species of participation is of course always principal; the second is so usually, i.e. unless the person so determined had independent motives for committing the crime; the third, viz. *opem ferre criminis*, is principal or accessory according as the assistance rendered was or was not necessary for the consummation of the crime. But as regards the first species the further question arises, What constitutes principal perpetration of the crime? If *A* holds the victim whilst *B* deals the fatal blow, are *A* and *B* *in pari delicto?* On this point a difference of opinion manifested itself between the Commission of the Chamber of Deputies on the one hand, and the Minister of Grace and Justice and the Commission of the Senate on the other. The latter wished to include, besides the actual *esecutori* of the crime, any persons who immediately co-operated therein. The former considered that such persons should only be classed as principals when their co-operation had been necessary to the consummation of the crime.

The *dux sceleris* or *auctor intellectualis* is he who by means of threats or bribes, or by any other arguments of persuasion or coercion, induces another person to commit a crime. When the latter however has acted partly from independent motives, the punishment of the former is reduced by one-sixth. This reduction amounts to one-half in the case of aiders and abettors whose share in the crime consisted either in inciting or confirming the resolution to commit it; in giving instructions or furnishing the means for its commission; or thirdly in facilitating its execution by lending assistance or aid before or during the fact, or even after the same, if by previous arrangement. If in these cases the aid rendered was so material to the perpetration of the crime, that but for it 'the crime would not have been committed,' the party who rendered such aid is punished as a principal.

Omitting, for the sake of brevity, and in view of their somewhat technical character, any reference to Titles VII and IX, I shall close this review of the general part of the Code with a few remarks on the

provisions it contains respecting the treatment of relapsed criminals, one of the most important problems with which, at the present time, criminal legislation is called on to grapple. In Italy, as in most other European countries, the increase of this class of delinquents is viewed with apprehension. Since the important debates on this subject at the International Penitentiary Congress held at Stockholm in 1878, some continental writers have advocated the infliction of perpetual punishment on habitual criminals, or at least their detention in confinement for such an indefinite period as might be necessary to cure them of their moral infirmity. A practical step in this direction is the severe law recently enacted against *récidivistes* in France. Other writers, on the contrary, would have us combat this evil in its causes rather than in its effects. Improved systems of prison discipline tending to make punishment more reformatory than it is at present, the removal of those difficulties which beset the ticket-of-leave man's return to the midst of a society which regards him with distrust and abhorrence; such are the principal remedies relied on by writers of the opposite school.

The framers of the Code were of opinion that in the present state of the question a middle course was advisable. To inflict perpetual punishment, not in view of the gravity of the actual crime, but in view of the criminal's antecedents, would be to ignore the proportion which should always exist between the offence and the penalty. As for punishments inflicted on criminals *donec bene se gesserint*, these would, in Senator Pessina's words, be 'in absolute contradiction with the nature and scope of penal justice.' The Code distinguishes then between generic and specific relapse, according as the second or ulterior crime committed within a definite lapse of time is of a different nature from the first, or as it violates the same law or one comprised within the same title of the Code. The former, as the more venial, only excludes the application of the minimum punishment established for the given offence. Specific relapse involves the increase of the punishment which would otherwise be awarded by one-sixth to one-half.

Such in bare outline are the fundamental principles of the new Italian Criminal Code, the Draft of which has been approved by both Houses of Parliament, and which, amended in conformity with the recommendations of those bodies, will be promulgated on or before 30th June of this year, and will come into force within two months from the day of its promulgation. To do justice to these principles, to trace their historic origin, to illustrate their bearing on Italy's social conditions, and their relation to the laws of other members of the European commonwealth, is a task beyond the scope of this article. But even this cursory review may serve to

show that modern Italy is true to her noble traditions in the sphere of criminal jurisprudence. The lamp of legal learning which shed such effulgence over Imperial Rome, rekindled by the *Glossatores* of Bologna, has never ceased to burn in Italy, throughout all the succeeding centuries. The framers of this first Italian Criminal Code, and not least of them the Minister whose proud distinction it is to have given his name to it and to the Commercial Code of his country, have shown themselves desirous and capable of adding to the heritage of the past the stores of knowledge derived from the progress of the sciences, from the comparison of the laws of the most civilized communities, and from the ever accumulating ethical experience of mankind.

T. Boston Bruce.

A REPLY ON THE FACTORS ACTS.

IN the number of this REVIEW for July, 1888 (vol. iv. p. 247), Mr. A. Cohen, Q.C., wrote as follows:—

'The decision in Lord Sheffield's case certainly took the mercantile world by surprise, for in the case of *Goodwin* v. *Robarts* (L. R. 1 App. Cas. 476) decided in the year 1876, the bankers were held entitled to retain the negotiable instruments on which they had advanced money, although they took them from a broker. It is true that it was not *proved* in that case that the bankers knew that the broker was not the owner of the securities, but there can be scarcely any doubt that in fact they had such knowledge. The very eminent counsel who argued the case did not think it necessary to prove that fact, nor was it in any way suggested by any of the noble and learned Lords who delivered their opinions in the case that a person who advances money on negotiable instruments to an agent known not to be the owner of them, is put upon inquiry as to the broker's authority. It seems to have been generally assumed that a person who advances money *bonâ fide* on negotiable instruments acquires a good title, and need not enquire into the authority of the agent from whom he receives them.'

I have thought it wiser to quote Mr. Cohen's own words rather than attempt a paraphrase of them.

In the April number of this REVIEW Mr. Cohen returned to the subject, using in substance the same argument, and in a paper read before the Institute of Bankers on April 12, 1889, Mr. Cohen dealt with the matter in somewhat greater detail, arriving at the conclusion that such a state of the law was intolerable, a conclusion in which it is needless to say his banking audience agreed with him.

But, no doubt unintentionally, Mr. Cohen has misrepresented both the law and the facts of both *Goodwin* v. *Robarts* and Lord Sheffield's case.

In the first case it is true that counsel did not attempt to prove that the bankers in fact knew that the broker was not the owner of the securities, because the 'special case' which stated the facts for decision stated that 'the defendants (the bankers) were not aware until after the sale of the scrip by them that it was claimed by or belonged to the plaintiff,' or in other words that the bankers had not the knowledge which Mr. Cohen now imputes to them. Consequently the judges were not likely to suggest 'that a person who advances on negotiable instruments to an agent known not to be the owner of them is put upon inquiry as to the broker's

authority.' The point they had to decide was the exact converse, viz. on the assumption that the bankers had no knowledge and that they believed the broker to be the owner of the securities, were they to be deprived of those securities because for some reason connected with the nature of the securities themselves they were to be held to have notice of the plaintiff's title?

The plaintiff's contention was unceremoniously disposed of, and he was in fact told that what he took and dealt with as negotiable instruments must be so treated for all purposes in the absence of notice affecting the bankers.

Mr. Cohen in his anxiety to assist bankers imputes to them (in 1876) a knowledge which, in Lord Sheffield's case (ten years later), they expressly repudiated—one of them pleaded that the bank had no notice knowledge or even suspicion that Mozley (who deposited the securities with them) was not the owner of the securities or that any one else had an interest. But it was proved beyond all doubt that the banks knew that Mozley was not the owner, and on that ground the decision proceeded. No one disputed that *Goodwin* v. *Robarts* had been rightly decided, but that decision was taken to have proceeded on the fact that the bankers had no notice of the plaintiff's title, and therefore was not an authority in a case where it was proved and is now admitted that the bankers had notice.

Whether the law should be altered in the way Mr. Cohen advocates I do not enter upon. My object is to show that the decision in Lord Sheffield's case is not open to the animadversions Mr. Cohen has cast upon it.

JOHN R. ADAMS.

REVIEWS AND NOTICES.

[**Short notices do not necessarily exclude fuller review hereafter.**]

Commentaire de la loi du 20 *mai* 1882 *sur le mariage de Belges en pays étranger, abrogeant l'article* 170 *du code civil.* Par ÉMILE STOCQUART. Bruxelles: Émile Bruylant. 1888. 8vo. 79 pp.

In the *exposé des motifs* of the law in question it was said: 'If the government encourages young men who have gone through a special course of study to establish themselves among populations with which it is our interest to extend our relations; if it stimulates Belgian commerce to found houses of business in certain localities, in order to create new outlets and increase the wealth of the country; it is its duty to provide also as far as possible that the citizens who go abroad may be able to found legitimate Belgian families by means that will be valid in Belgium.' The law which was accordingly passed deals with the conditions under which marriages celebrated abroad between Belgians or between Belgians and foreigners will be recognised as valid in Belgium; and M. Stocquart has given a clear and useful commentary on it, comparing it with the legislation of other countries as well as with that which preceded it in its own country, and mentioning the decisions which have as yet been given on it. Three points appear especially noticeable.

First, by its § 3, the new law provides that 'the diplomatic agents and consuls of Belgium may celebrate marriages between Belgian men and foreign women, if they have received a special authority to that effect from the minister of foreign affairs.' The old law gave the power only when both parties were Belgian. At present, M. Stocquart says, 'the special instructions issued by the department of foreign affairs recommend our diplomatic agents (1) not to marry a Belgian man to a foreign woman without assuring themselves that it is really quite impossible for the parties to be united by means of the local formalities; (2) to inform the intending couple that their marriage, if contracted at the diplomatic or consular chancery, will not necessarily be valid except in Belgium; and (3) to require the foreign woman, if the occasion calls for it, to prove her capacity according to the law of her country:' p. 40.

Secondly, §§ 4 and 5 of the new law would seem to provide that there is to be preliminary publication, of banns as we should say, according to Belgian law, but that marriages celebrated abroad in accordance with the preceding sections are not to be invalidated for want of it. The decisions however are in conflict as to whether this is the true meaning; and in any case it appears to be agreed that a deliberate attempt to marry secretly continues to be a cause of nullity under the name of *clandestinité*.

Thirdly, § 6 provides that 'the capacity of the foreign woman is governed by her personal statute,' but the opportunity has not been taken to declare in a legislative way whether the personal statute is to be derived from nationality or from domicile. M. Stocquart, however, quotes two decisions

of 1882 in which the Belgian court of cassation held on principle that status and capacity are governed by the law of the nationality, and shows that the pending project for the revision of the Belgian civil code expressly says the same, with the reservation, which of course would equally apply if the test had been taken from domicile, that a foreign law cannot be applied if it is opposed to public order or morality; p. 55. J. WESTLAKE.

The Conveyancing and Settled Land Acts with other recent Acts—Conveyancing Acts 1881 *and* 1882: *Settled Land Acts* 1882, 1884 *and* 1887: *Trustee Act* 1888: *Married Women's Property Act* 1882: *Land Charges, &c. Act* 1883: *with commentaries.* By H. J. HOOD and H. W. CHALLIS. Third Edition. London: Reeves & Turner. 1889. 8vo. xxxvi and 476 pp.

THE former editions of this book contained an essay on the Law of Real Property by Mr. Challis, which has been published separately, and is, in the opinion of competent authorities, one of the best books on the subject. We therefore expected to find a very high standard of excellence in the book now before us, and we have not been disappointed. In some law books the learning is veiled by the obscurity of a crabbed style, in others there is no learning to conceal, the present book is replete with learning, sometimes on obscure and difficult questions, expressed in a very terse and lucid manner; as examples of this consider the treatment of 'general words,' p. 20 of the rules as to the custody of and the right to title deeds, p. 41; of the application of moneys arising from the sale of leaseholds or reversions, p. 251, and of the rights of a husband over his wife's property, p. 324.

We should like to have learnt the opinion of our authors on the two following questions.

First. If Blackacre is devised to the subsisting uses of an existing settlement, is Blackacre so far incorporated with the land comprised in that settlement as to cause persons appointed after the death of the testator new trustees of the settlement for the purposes of the Settled Land Acts to become new trustees of the will for those purposes, or so that incumbrances on Blackacre may be paid off out of capital moneys arising under the settlement?

Second. What is the effect of the 19th section of the Married Women's Property Act 1882? Does it exempt property given to a woman by her marriage settlement from the operation of the Act to such an extent as to prevent it from belonging to her for her separate use unless an express provision is inserted in the settlement?

It is always a question of great nicety for the author of a practical treatise on law to decide whether he shall discuss points that appear to require decision which have not arisen in a reported case. While we quite sympathize with our authors in not discussing the questions that we have mentioned, we think that the profession would have been grateful to them if they had thought fit to do so.

We may perhaps mention that we have some reason to believe that contradictory opinions on the first of these questions have been held in chambers by different judges. We think it right to point out that very considerable inconvenience arises owing to the fact that the great bulk of the decisions on the Settled Land Acts are made in chambers and consequently are not reported, the result being that conveyancers are put into great difficulty in advising on titles. They hear that a decision has been made in chambers, but as it is impossible to obtain an authentic report of

that decision, they cannot ascertain whether it is applicable to the question under their consideration or not. It is well worthy of the consideration of the judges whether some scheme might not be devised whereby, under very rigid restrictions, decisions of general importance given after argument in chambers might be reported.

The profession will feel very grateful to Messrs. Hood and Challis for the labour and learning bestowed on this book. The cases have been brought down to the middle of April, 1889, and there is a very full index. While the book will be found very useful to the busy practitioner, it will repay perusal by those who have time to study it at leisure. H. W. E.

Der Besitzwille. Zugleich eine Kritik der herrschenden juristischen Methode. Von Rudolf von Ihering. Jena: Gustav Fischer. 1889. 8vo. xvi and 540 pp.

In this work, which we can only briefly notice at present, Professor Von Ihering continues his attack upon Savigny's theory of possession in the Roman law, and takes occasion also to assail the methods prevalent on the Continent in jurisprudence generally. The task was commenced many years ago with the publication of *Der Grund des Besitzesschutzes*, but that work dealt with one branch of the subject only, and three others—the legal nature of possession, the *animus domini*, and the *constitutum possessorium*—were reserved for later treatment. The present work deals with the *animus domini*, and is designed to show that this constitutes no element in legal possession. In the previous volume, when the author was enquiring into the nature of such possession as was protected in the Roman law, he arrived at the conclusion that neither *corpus* nor *animus* were in fact required, but merely that the person asserting his claim to possession should to all external appearance be in the position of an owner. So far as we can at present judge, a position, even more definitely approaching the rules of our Common Law, has now been taken up, and the author is prepared to prove that the mere external fact of possession, defined positively by the possibility of actual control over the thing and negatively by the exclusion of others, was always enough to confer a right to possessory remedies, unless the other side could prove that the possessor stood in some relation, such as that of a borrower or hirer, in which the law recognised only detention. His point is that a possessor was never in fact bound to prove an *animus domini*, and that the theoretical requirement of this has been entirely without influence on practice. We have already acknowledged (vol. iii. p. 32) that the earlier work contained valuable suggestions for remodelling the current theory, but a careful examination is necessary to ascertain how far this later and still fiercer attack on accepted notions is successful. The author, however, contemplates more than the re-establishment of the theory of possession upon a right basis. This would never have tempted him to undergo the labour of these researches. His chief quarrel is with the formal or dialectical methods now current in jurisprudence, mere logical deductions of one rule from another, which he regards as altogether unfruitful. For these he would substitute methods based upon the real ends which rules and institutions are meant to serve, and the subject of possession is merely selected as a convenient and interesting topic by which to illustrate his doctrine. The preface warns us that the contest upon which Professor Von Ihering has entered is *à outrance*, and that his own name will suffer irremediable damage if the assault he has made on Savigny is not substantiated. We shall be excused therefore for taking further time to consider the issues which are raised.

J. M. L.

Interpolationen in den Pandekten: kritische Studien. Von Dr. Otto Gradenwitz. 8vo. Berlin. 1887. ix and 246 pp.

Dr. Gradenwitz is of that school of civilians, of whom Bekker of Heidelberg may be regarded as the most illustrious representative, who believe that modern jurisprudence is not to be advanced by putting a modern gloss on Roman doctrines. They would have these viewed from the standpoint of the Roman jurists who were their authors, and interpreted in the sense the latter meant them to bear; adopted if still in harmony with modern requirements, discarded if unsuited to or inadequate to meet the conditions of modern life and intercourse. To enable them to judge wisely what to accept and what to reject it is of no little importance to be sure that we have in the texts ascribed to individual jurists their own thoughts in their own words,—to be able to discriminate between what is really the language of the author whose name stands at the head of the fragment, and what is merely an interpolation of some Byzantine writer, qualifying or possibly altering the original meaning. Mommsen did something in this direction in the notes to his edition of the Digest; Lenel helped in his book on the Edict, and is giving further assistance in his magnificent Palingenesia; but many a monograph such as this before us will be needed to exhaust the subject. It is not a new one with Dr. Gradenwitz. He has several times attacked it in recent volumes of the Zeitschrift der Savigny-Stiftung; and his articles have aroused an intelligent and healthy interest in it not only in Germany but in France and Italy. No one has greater facilities for dealing with it than he has; for his knowledge of Roman law is wide and accurate, while his position as one of the triumvirate to whom has been entrusted the duty of preparing for publication the Dictionary of Classical Jurisprudence of the Berlin Academy ought to familiarise him with the turns of thought and language of the classical jurists to an extent that should enable him to detect a false ring more readily than those not enjoying the same advantage.

Every one who has even the most elementary acquaintance with the history of the Digest is aware that Justinian authorised his commissioners to make such alterations in the passages they transferred to it from the writings of the classical jurists as seemed necessary for adapting them to the changed state of the law. This was right and proper from the Emperor's point of view. But one is hardly prepared to concede that it was sufficient justification for putting into the mouth of Gaius or Julian doctrines the reverse of what was taught by them, and due in fact to the legislation of Justinian himself. A few instances of that sort of thing have attracted the attention of jurists ever since the time of Cujas, and Dr. Gradenwitz naturally alludes to them in the outset. But to bring into prominence such radical tampering with the originals is but a small part of the purpose of his book. His object is to indicate the frequency of interpolation of a less serious nature, not necessarily by Justinian's commissioners, but manifestly by Byzantine editors. Some of his animadversions may be thought rather trivial and to resolve themselves into mere disputes about words. But it is questions of words with which he is dealing,—his object, to show that the words ascribed to a classical author were not really his. *Adimplere, condonare, satisdationem dare, celebrare* (=*perficere*), *licentiam habere, certiorare*, and the like,—these were not words or phrases of the classical jurisprudence; and their presence in a passage ascribed to Celsus or Papinian gives rise at once to a suspicion of interpolation which may touch the meaning as well as the language. Interesting

is the process whereby the author comes to the conclusion that the *condictio ex poenitentia*, which Ulpian and others are made to speak of in connection with the so-called innominate contracts, was an invention of the Byzantine jurists, and all the allusions to it pure interpolations. Interesting too is the series of examples he gives of interpolations in *responsa*,—authoritative opinions of patented counsel upon cases submitted to them. An opinion is asked upon the construction say of a bequest, and Paul, or Ulpian, or Papinian, to whom the case is submitted, says it must be construed in a particular way. The *responsum* would not have been worth preserving, nor could it have been of any service to the client, unless it had resulted in a definite opinion. And yet in many of those preserved in the Digest we find such words added as '*nisi evidens voluntas contraria testatoris probetur*,' and the like. This may have been a very proper sentiment in the mouth of Justinian, who constantly insisted that the intention of parties should be regarded rather than their words; but no responding counsel would have dreamt of destroying the value of his opinion by appending to it such a qualification, which, wherever it occurs, must be regarded as interpolation.

We cannot, however, go further in indicating the line of treatment of his subject which Dr. Gradenwitz pursues. But we commend his book to those—unhappily too few—who find pleasure in the critical study of the Roman texts.

Die Ungültigkeit obligatorischer Rechtsgeschäfte. Von Dr. Otto Gradenwitz. Berlin. 1887. 8vo. xii and 328 pp.

The purpose of this book is to demonstrate the impossibility of constructing out of the material contained in the *Corpus Juris Civilis* any general system of doctrine relative to void and voidable transactions of an obligatory character. What the Roman jurists supply us with on this subject is wonderfully acute and severely logical. But it is for the most part what the author calls detail work,—the expiscation of the nature, conditions, and consequences of various instances of invalidity, but each regarded apart and without reference to any other.

In order to substantiate his position Dr. Gradenwitz devotes the greater part of the volume to an exposition of the law relating (1) to engagements and releases extorted by duress, (2) to intercessionary obligations, direct or indirect, by women, and (3) to engagements and releases that amounted to donations between married persons. An extorted promise was *ipso jure* valid; it was only by praetorian law that it could be set aside by an *actio quod metus causa*, or defeated by an *exceptio metus* when attempted to be enforced by the promisee. An intercessionary undertaking by a woman, whether by becoming *expromissor* or in any other way, was declared null by the Velleian Senatusconsult. Renunciation of the benefit of the statute could not affect the woman's right to plead the nullity; yet, if she chose to fulfil her engagement in full knowledge of her position, there was no room for a *condictio indebiti*. The prohibition of donations between husband and wife was due neither to statute nor to the Edict, but was introduced by custom, and relaxed rather than made more stringent by the imperial legislation. It is probable that Sextus Caecilius is nearer the truth than Ulpian in his statement of its motive—that it was intended to prevent one of the parties taking unfair advantage of the generosity of the other, getting all he or she could in the shape of gifts, and then meanly putting an end to the marriage by divorce. So it was declared that a gift or promise of a gift, otherwise than *mortis* or *divortii causa*, by a husband to his wife or a wife to her husband, should be of no effect. A donatory

promise did not even create a natural obligation; if fulfilled, the fulfilment might be rescinded; for to fulfil a donatory promise was again to make a donation and again to contravene the prohibition. And yet, by the *oratio Severi*, the forbidden and therefore void donation might become valid when the reason of the prohibition and the nullity had disappeared, namely, when, the marriage still subsisting, the donee died without having revoked the gift.

It is obvious to a certain extent that, in cases of invalidity so essentially dissimilar as those three, the practical consequences must have been very divergent; but it requires such a working-out of them as we have in this volume to make us fully aware how little analogy could be drawn from one to throw light on the others. Dr. Gradenwitz has thoroughly established his thesis. In doing so he has given us very complete expositions of the three subjects he has made the basis of his argument. He follows them into all their ramifications, dealing with great skill with the position of third parties brought into relation, by delegation, suretyship or otherwise, with the persons primarily interested in the invalid transactions he describes. This critical and exegetical treatment of texts that seem to require conciliation provokes admiration and rarely fails to satisfy. As a study in pure Roman law his book is as interesting and instructive as any that has come under our observation of late years.

Lectures on Scots Law. By T. C. Young and Robert Hislop. Glasgow: William Hodge & Co. 1889. 8vo. viii and 105 pp.

These are six lectures delivered under the auspices of the Stirlingshire Faculty of Solicitors and Procurators, and form a creditable contribution to the literature addressed to law-students. Of the three lectures by Mr. Young, the first deals with 'possession' as applied chiefly to moveables; and the other two with 'contract.' Principles of common application in commercial practice are grouped in a somewhat novel and ingenious way under the headings of familiar maxims. Thus under *delectus personae* are cited the cases upon the question whether a manufacturer who has undertaken to supply ship-plates according to specifications from time to time to be furnished by the buyer, is entitled to tender, in fulfilment of his contract, plates made by another manufacturer. On this question the Court of Session, by a bare majority (*West Stockton Iron Co.*, 1580, 7 Rettie, 1055), have pronounced in the affirmative, and the Court of Appeal in England by a like majority (1881, *Johnson* v. *Raylton*, 7 Q. B. D. 438), in the negative. The dissent of Lord Young in the former case, and of Lord Justice Bramwell in the latter, leaves the question a debateable one, and the author justly observes that the difference of opinion will require to be settled by the House of Lords. In this particular trade, however, manufacturers will probably modify their contracts so as to be express upon the point. On another question the statement of the lecturer is more open to exception. He says (p. 26), 'Under the Scotch law the seller of an article who knows of a latent defect and does not disclose it is guilty of fraud, and the contract may be annulled on that ground (*Rough* v. *Moir*, 1875, 2 Rettie, 529). In the English law, on the other hand, the seller is not bound to tell the latent defects in his wares (*Ward* v. *Hobbs*, 1879, 4 App. Ca. 14).' It may be doubted whether, since the Mercantile Law (Scotland) Amendment Act 1856 (19 & 20 Vict. c. 60, s. 5), there is any practical difference between the law of Scotland and that of England on this point. If there is, the case cited of *Rough* v. *Moir* is certainly not an example. That was a sale by auction of a horse described

in the catalogue as having been 'driven regularly in double and single harness.' According to the evidence the horse had been tried in single harness and found quite unmanageable, and in double harness had never gone quietly except on one occasion to a funeral. It was a simple case of false representation, and the result would doubtless have been the same in an English court.

The remaining three lectures (by Mr. Hislop) deal with real property law, and are devoted to the relations of Superior and Vassal. The author has cleverly selected and briefly stated the salient points in the development of the feudal relation in Scotland; and he sufficiently indicates the methods by which, without historical discontinuity, the inconveniences of the old system have been eliminated by modern legislation. The history of the tenure of *feu-farm*, as inaugurated and confirmed by Acts of the Scottish Parliament in 1457 (c. 71), 1503 (c. 91), and 1690 (c. 33), is particularly well stated and its importance noted; and the results of the Conveyancing Act of 1874, which placed the relations of superior and vassal upon their present footing, are described with clearness and without unnecessary technicality.

The Law relating to Goodwill. By CHARLES E. ALLAN. London: Stevens & Sons, Limited. 1889. 8vo. xii and 171 pp.

THE expression 'goodwill' is used in so many connections and with so many varieties of meaning, that the task of definition undertaken by the author in his introductory chapter, and in the ensuing chapter, under the heading 'Good-will without more—its meaning in law,' is a welcome contribution to precise legal terminology. Chapter III, on the 'Good-will of a personal business,' deals with questions relating particularly to the business of an attorney or a medical practitioner, while postponing to the concluding chapter (VII) the matter relating to 'restraint of trade.' The fourth chapter, upon 'the involuntary alienation of good-will,' deals with questions arising upon bankruptcy, death, dissolution (in the absence of articles) of partnership, the compulsory purchase of an undertaking under the private Acts of some of the more recent gas and water companies, and upon possession being taken by a mortgagee of the business premises. Chapter V deals with the voluntary disposition of good-will; and Chapter VI with good-will as affecting the value of land. Subsections of the last-mentioned chapter deal with compensation in the case of land 'compulsorily taken' and of land 'injuriously affected' by the execution of the works, etc., under the Land Clauses Consolidation and Railway Clauses Consolidation Acts, 1845; and the author points out that, notwithstanding the numerous decisions, the question remains an open one upon what principles compensation is to be assessed where land, which is not taken, is injuriously affected by what in the absence of the statutory power would be an actual trespass upon the land. There is nothing to show that in such a case (notwithstanding Rickett's case, L. R. 2 H. L. 175) injury to good-will might not be taken into account, just as in a case where land is taken. This indeed is a point as to which authoritative decision is hardly to be looked for. Where the discretion of the arbitrator is once admitted, little scope is left for legal decision.

Wharton's Law-Lexicon, forming an epitome of the law of England, etc. Eighth Edition. By J. M. LELY. London: Stevens & Sons, Limd. 1889. Large 8vo. viii and 783 pp.

DOUBTLESS no one knows better than the present learned editor that no possible law-lexicon can really form an epitome of the law of England. Probably the present learned editor knows as well as any one that the

antiquarian part of this law-lexicon (as of most others) is worthless. We suppose he has left it alone as not worth mending. Anyhow no attempt has been made to mend it; nor, apparently, to mend various other faults. On the very first page 'abacot,' though proved by Dr. Murray to be a *vox nihili* (see 'bycocket' in the Oxford English Dictionary), struts unabashed. 'Assithment' and 'assythment' figure as two distinct words, and there is no hint that the latter is not an English but a Scottish term of art. See also 'Tanistry,' where there is not a word about Ireland. The neo-antiquarian sense of 'mark' (in the so-called 'mark system') is not given at all. 'Assisa cadit in juratam' (misprinted 'juratum') is wrongly explained. Such articles as 'copyhold,' 'manor,' stand as they were written in a pre-scientific generation, and without even a reference to modern works such as Mr. Elton's. The Anglo-Indian 'Adawlat' is not 'corrupted from' the word now more precisely transliterated *adálat*, but is a correct phonetic rendering. Then it is a somewhat musty practical joke to refer the modern lawyer to a case in Vesey for authority as to what is deemed a fair abridgment of a book. But enough of this. What Mr. Lely has done is to bring down to date such articles as 'Inns of Court,' 'Solicitors,' 'Terminal charges,' 'Trade Marks': and this appears to be well done. More could hardly be expected of him. But when will some one give us a handy law-lexicon confined to terms in current use, and furnished with concise but sufficient references to the latest books on the several subjects? The mass of antiquarian blunders which law dictionaries have been copying one from another for about two centuries is fit only for one thing, to be swept clean away and forgotten.

The Railway and Canal Traffic Acts 1864 *to* 1888, *with Notes, etc.* By H. R. Darlington. London: Reeves & Turner. 1889. 8vo. xl and 486 pp.

The Acts dealt with in this volume are The Railway and Canal Traffic Act, 1854, The Regulation of Railways Act, 1873, The Board of Trade Arbitration Act, 1874, The Cheap Trains Act, 1883, and The Railway and Canal Traffic Act, 1888. The principle on which these Acts are selected is that they comprise the enactments with which the Railway Commissioners are concerned; and the object is to make a handy book of reference for practice in their Court.

This limited object has been carried out with exact diligence. The cases in the Courts of the United Kingdom which are capable of being ranged under any section of these Acts have been carefully collected and noted in their proper places; and in relation to the points of procedure comprised in the rules, numerous cases are cited upon collateral points of procedure in the Supreme Court of Judicature. But upon collateral topics relating to the business of Railway and Canal Companies as carriers—apart from cases decided under some section of these Acts—the book is a blank. In this respect, as well as by citing American cases, which are very instructive upon this branch of law, Mr. Macnamara's book on the Law of Carriers will be found much more useful.

The general principle of arrangement adopted by Mr. Darlington, is to deal with the cases respectively under the section of the statute to which they relate. Having regard to the immediate purpose and scope of the book, perhaps this is inevitable. But the Acts themselves have no such systematic order as to make the arrangement attractive. The drawbacks incident to the arrangement are however, for practical purposes, obviated by a good

index; as well as by the introduction and summary which give a clear and fairly well-arranged account of the object and scope of the Acts.

The New Law and Practice of Railway and Canal Traffic, being the Railway and Canal Traffic Act 1888, *and the Rules of Procedure, etc.* By ROBERT WOODFALL. London: W. Clowes & Sons, Limited. 1889. 8vo. xv and 221 pp.

THIS is a work on the same subject, but of still more limited scope. The Act of 1888 is set forth; and references to the older statutes, and the cases decided under them, are briefly noted under each section. The more important provisions of the earlier Acts, and also the General Rules, are set out in Appendices. The Introduction gives a brief history of the circumstances under which the successive Acts have been called for, and an outline of the effect of legislation under the recent Act. The Index, though not very full, appears sufficient.

We have also received:—

First Report of the Royal Commission on Market Rights and Tolls, containing the First Report of the Commissioners, together with the Report by C. J. Elton, Q.C., M.P., Commissioner, and B. F. C. Costelloe, Assistant Commissioner on Charters and Records relating to the history of Markets and Fairs in the United Kingdom, vol. i. Presented to both Houses of Parliament by command of Her Majesty. 1889. London: Eyre and Spottiswoode. fol. 231 pp.—This book deserves the careful attention of students of legal and historical antiquities. It consists of a 'Report' by Mr. Elton and Mr. Costelloe and an appendix. The 'Report' traces the history of fairs and markets in England, Ireland and Scotland from the earliest times. Some of the more important points discussed are the account of the provisions in the early English codes relating to the publicity of sales (p. 14); the constitution of early English towns (p. 12); the jealousy shewn by the owners of a market on the establishment of a new market or trading town near their market (p. 21). Some of the facts mentioned incidentally by Mr. Elton make us wish that it had fallen within the scope of his labours to have discussed them. What, for instance, was the origin (p. 17) of the right of the Reeve of Lincoln to veto the sale of any tenement in Lincoln to anyone who was not a burgess or kinsman of the vendor except in the case of tenements held by men of Torksey, a town in some way annexed to Lincoln? Does the reeve represent the burgesses as *vicini*? or is the suggestion of a long missing English parallel to the Salic law *de migrantibus* illusory? Were the men of Torksey allies who stipulated for privileges as the price of their alliance, or what? The appendix contains many extracts from early laws, charters and records, lists of fairs and statutes.

Études d'histoire du droit. Par RODOLPHE DARESTE. Paris: Larose et Forcel. 1889. 8vo. xii and 417 pp.—This is perhaps the most useful and comprehensive manual for students of comparative jurisprudence which has yet been published. M. Dareste ranges over a wide field—in space from Persia to Ireland, in time from the earliest Egyptian documents to Scandinavian or Polish customs reduced to writing as late as the thirteenth century. It is needless to say that M. Dareste does not pretend to have investigated all these laws and customs at first hand. But he has apparently made use of the best sources of information, and, besides being well versed

in the modern German learning, he is, like Sir Henry Maine, a scholar in the old-fashioned eminent sense of the word, and knows his Gaius. We believe with Maine that in the early history of Roman and Hindu law we have the best of clues to much else; and accordingly M. Dareste appears to us a specially well-qualified person for this work. Attention may be called to his treatment of the old Irish law, where he propounds a new and ingenious solution of the puzzle of degrees of kindred which neither Maine nor M'Lennan can be said to have disposed of. The essay on the Salic law shows M. Dareste as a sound and impartial scholar, pursuing his way with little regard to the controversy which has lately been raised on certain points.

The nature and value of Jurisprudence. By CHAN-TOON. Second (enlarged) edition. London: Reeves & Turner. 1889. 8vo. vii and 187 pp.—Mr. Chan-Toon's notes on the history and methods of the modern analytical and historical philosophy of law have developed into a little book. As a guide to certain branches of the recent literature of these subjects it may be found a profitable book by students. The writer is laudably anxious to be exact in reference and bibliography, and he has not omitted to index his own work. When he turns to the index again some years hence he will probably look back with a certain surprise on the extent of the ground which he has covered in less than two hundred pages. The general classification of law, the early history of marriage and the family, and the comparison of the Roman and English doctrines of possession and transfer of property, will by that time appear to Mr. Chan-Toon, as clearly as they now do to us, to be something too much, both in absolute quantity and in diversity of quality, to be conveniently digested in such a compass. Experience will also teach him (as nothing else can) the art of using authorities with due regard to scientific and literary proportions, and the value of attention to style. We do not suspect Mr. Chan-Toon of thinking, even now, that the 'analytical method' and the 'comparative method' are instruments which can be bought or supplied to order for producing certain kinds of results, though he sometimes writes as if he thought so. In short, he might have done better to wait a year or two longer; but the promise of his work is quite enough to make us wish to see more of it hereafter, when he has matured his purposes and chosen some definite line.

Manuel théorique et pratique des agents diplomatiques et consulaires français et étrangers. Par ERNEST LEHR. Paris: Larose et Forcel. 1888. xviii and 425 pp.—This volume is a reprint from the *Répertoire général et alphabétique du droit français.* Its size affords some idea of the scale on which this monumental encyclopedia of French law is being carried out. M. Lehr's object was of course to produce an exhaustive encyclopedia article, embracing in as compact a form as possible all that relates to the functions, rights, and duties of diplomatic and consular agents. He has classified the opinions of those who have made the subject one of special study; and where he has not found authorities for any branch or particulars he has filled up the gaps by information derived from practical sources. The book, moreover, is not confined to a statement of the French practice on the subject. Besides numerous references to foreign authorities the author has devoted thirty-five pages to the regulations in force in Germany, Austria-Hungary, Spain, the United States, Great Britain, Italy, and Russia. M. Lehr does not appear to have utilised the useful 'Règlements Consulaires' of Belgium issued in 1887. There is an exhaustive and excellent index.

Histoire du droit fluvial conventionnel. Par ED. ENGELHARDT. Paris:

Larose et Forcel. 1889. 110 pp.—This interesting little volume is practically an introduction to the larger one 'Du régime conventionnel des fleuves internationaux' published by the same author in 1879. The subject is one with which M. Engelhardt, as former French representative on the Danubian Commission, has had reason to occupy himself specially, and he has done good work in offering to the public some of the fruits of his study. The Congo and Niger, Orinoque and Zambesi questions are all matters of current interest, and the law of international rivers wanted a historian. It is to be hoped that M. Engelhardt will not stop at this rather too short sketch, but will give us some day a much fuller account of the negotiations which have taken place more especially in the course of the present century. We do not quite understand what M. Engelhardt means at p. 98 by the 'exclusivisme colonial suivi par l'Angleterre sur le continent africain.' Is not that policy in general rather the prevention of 'exclusivism' by other States?

Code de Commerce du royaume de Roumanie, traduit d'après le texte officiel. Par J. BLUMENTHAL. Paris: Pichon. 1889. 259 pp.—This Code came into operation in September 1887, and is probably the most recent of the Continental Codes. We may mention that it is based on the new Italian Code of Commerce, which, it is well known, was very largely inspired by the German codifying laws. The Code the new Roumanian Code takes the place of was practically the French Code of Commerce, the order of which is still retained. The translator might have prefaced his translation with an explanatory introduction and added a few comparative notes, instead of confining himself to the bare bones of text and ministerial report. However, we must not be ungrateful for what is given us. Most people everywhere will be glad to be spared the task of spelling out the original, especially as the translation appears to have been carefully executed by a competent jurist.

Les principes fondamentaux du droit. Par le comte de VAREILLES-SOMMIÈRES. Paris: Pichon, Guillaumin. 1889. xxxvi and 491 pp.—The author is a Professor of the Catholic Law School at Lille, and of course his teaching as such is subject to the censure of the Church. Under these circumstances it is scarcely possible to deal with the book as a work of science. It nevertheless shows the tendencies of some French thinkers on the first principles of law, and though the author's own views can hardly be the result of free investigation, his statements on those of past and contemporary writers are interesting.

The Law relating to Particulars and Conditions of Sale on a Sale of Land. By WILLIAM FREDERICK WEBSTER. La. 8vo. xliv and 456 pp. London: Stevens & Sons, Limited.—The nature of this work may be judged from its title. The subject is not a large one, but it is important, especially to solicitors. They will find in this volume a full account of the case law, well arranged under convenient headings, together with a few precedents. The book is fit to be of practical service to a practical man.

Blackstone's Elements of Law, etc. By V. BLICKENSDERFER. London: Stevens & Sons, Limited. 1889. 8vo. 356 pp.—An American book with an English title-page. It is an abridgment of Blackstone in numbered paragraphs, with references to notes in which Blackstone's authorities, with or without other matter, were presumably intended to be given. We cannot however discover any such notes in the English issue. The book may be useful to those who regard Blackstone as an ultimate authority.

The Law relating to Local Rates, with especial reference to the Powers and Duties of Rate-Levying Local Authorities and their officers. By G. F. CHAMBERS. Second edition. London: Stevens & Sons, Limited. 1889. La. 8vo. iv and 224 pp.—This new edition will doubtless be found opportune by those who either as makers or as payers of rates under our new county government have to consider this branch of the law.

The Law of France relating to Industrial Property, Patents, Trade Marks, Merchandise Marks, etc. By THOMAS BARCLAY. 1889. London: Sweet & Maxwell, Limited. 8vo. xvi and 244 pp.—Mr. Barclay's competence is well known to our readers. His book will no doubt be a safe and welcome guide to lawyers and merchants who have to do with French commercial matters.

Le problème des origines de la propriété foncière. Par FUSTEL DE COULANGES. Bruxelles: Vromant et Cie. 1889. 8vo. 95 pp.—An article from the *Revue des Questions historiques*, continuing the line of trenchant negative criticism on which the learned and ingenious author has been proceeding for some time. One cannot help asking, if M. Fustel de Coulanges had treated himself as he treats Von Maurer and M. Paul Viollet, where would 'La Cité Antique' be?

La question des assurances contre les accidents devant la commission du travail. Par H. F. G. ADAM. Bruxelles: E. Guyot. 1888. 8vo. 54 pp. —The author opposes on general grounds of policy any scheme of compulsory insurance against accidents which would exclude personal responsibility for actual and proved negligence.

Il diritto comune. Per O. W. HOLMES, Jr. Tr. di Francesco Lambertenghi. Parts v–vi. Sondrio: A. Moro e Ca. 1889. 8vo. 219–332 pp.—Part of a translation of Judge Holmes's 'The Common Law.' The previous parts, of which there seem to have been two or three, have not been received.

Le Statut personnel anglais ou la loi du domicile. Par A. V. DICEY. Translated by EMILE STOCQUART. Vol. II. Paris: Chevalier-Marescq & Cie. London: Stevens & Sons, Limited. Brussels: Bruylant-Christophe & Cie. 1888. 8vo. 402 pp.

The Bengal Code. Vol. I. Containing the Bengal Regulations, the Local Acts of the Governor General in Council, and the Regulations made under 33 Vict. cap. 3, in force in Bengal. Second edition. 1889. Calcutta: Government Press. La. 8vo. lii and 681 pp.

A Digest of the Law relating to Public Libraries and Museums, and Literary and Scientific Institutions. By G. F. CHAMBERS. Third edition. 1889. London: Stevens & Sons, Limited. La. 8vo. viii and 175 pp.

Ancient Charters Royal and Private, prior to A.D. 1200. Part i. Edited and annotated by J. H. ROUND. Printed from the originals in the custody of the Right Hon. the Master of the Rolls, under the direction of the Council of the Pipe Roll Society. London: Wyman & Sons. 1888. 8vo. xii and 133 pp.

The Lays of a Limb of the Law. By the late JOHN POPPLESTONE. Edited by E. B. V. CHRISTIAN. London: Reeves & Turner. 1889. 8vo. xx and 162 pp.

Les Fraudes dans les Marques commerciales: nouvelle législation anglaise. By THOMAS BARCLAY and E. DAINVILLE. Paris: G. Pedone-Lauriel. 1889. 30 pp.

Essai sur le régime parlementaire. Par X. S. COMBOTHECRA. Paris: L. Larose et Forcel. 1889. 8vo. 158 pp.

La Ratifica degli atti giuridici nel diritto privato romano. By CESARE BERTOLINI. Vol. I. Rome: L. Pasqualucci. 1889. 128 pp.

Possession in the Civil Law, abridged from the Treatise of von Savigny, to which is added the Text of the Title on Possession from the Digest. By J. KELLEHER. Calcutta: Thacker, Spink, & Co. London: W. Thacker & Co. 1888. 8vo. xii and 264 pp.

The Student's Guide to the Principles and Practice of the Common Law. By JOHN INDERMAUR. Second edition. London: G. Barber. 1889. 8vo. 144 pp.

The Work of the Advocate. A practical Treatise containing suggestions for Preparation and Trial, &c. By BYRON K. ELLIOTT and WM. F. ELLIOTT. Indianapolis, Ind.: The Bowen-Merrill Co. 1888. La. 8vo. viii and 762 pp.

Home Rule and Federation. With remarks on Law and Government and International Anarchy; and with a proposal for the Federal Union of France and England, as the most important step to the Federation of the World. London: E. Truelove. 1889. 8vo. 54 pp.—The title of this pamphlet will suffice for most of our readers. Anyone who wishes to know more can buy it for twopence.

NOTES.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

Are Leaseholds Tenements?

The question whether a true tenure exists between a lessee for years and the reversioner, in other words, whether a leasehold for years is a tenement, has often troubled the minds of real property lawyers. The reader may perhaps think that this question is one of mere theoretical interest, but it is one of very great practical importance.

This question is discussed by Messrs. Hood and Challis in a very learned commentary on the definition of land contained in the Conveyancing Act 1881, s. 2 (ii), which says, 'Land, unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal and incorporeal, and houses and other buildings, also an undivided share of land.' The authors are of opinion that terms of years are excluded by this definition, on the ground that the words 'land of any tenure and tenements and hereditaments' do not include them.

Bearing in mind that Brougham's Act, 13 & 14 Vic. c. 21, s. 4, provides that in an Act of Parliament 'land' includes 'messuages, tenements and hereditaments, houses and buildings, of any tenure unless there are words to . . . restrict the meaning to hereditaments of some particular tenure,' it will be observed that if leaseholds for years are excluded by the definition of land in the Conveyancing Act 1881, they are probably excluded by the definition in Brougham's Act.

Messrs. Hood and Challis say, Conveyancing and Settled Land Acts, third edition, at p. 2, 'The phrase "land of any tenure" properly means land of freehold, copyhold and customaryhold tenure. This includes (1) freeholds commonly so called, conformable in all respects to the course of common law, which is the general custom of the realm; (2) freeholds associated with peculiar customs, such as gavelkind, borough-English and the like, which in these particulars vary from the course of common law; (3) copyholds held by copy of court-roll at the will of the lord; and (4) customary freeholds, which are a peculiar form of copyholds, requiring admittance in order to acquire the legal estate, and usually expressed to be held according to the custom of the manor without any reference to the will of the lord. Although the incorrect and misleading expression, "leasehold tenure," in reference to lands held for a leasehold interest, is sometimes used even by conveyancers of high reputation, yet the phrase "land of any tenure" does not, in its ordinary usage, include terms of years; nor can it here be supposed to do so, except by making it include all estates and interests in lands, which would render the rest of the definition superfluous:' and they refer to Challis, R. P., p. 37 to 41, where he cites part of the following passage:—Coke says, Co. Lit. 6 (*a*), 'Tenement is a large word to pass not only lands and other inheritances that are holden, but also offices, rents, commons, profits, à prendre out of lands and the like wherein a man hath any frank tenement, and whereof he is seised *ut de libero tenemento*.'

Coke does not say that 'tenements' passes freeholds only; all that he

appears to mean is that 'tenements' is sufficient to pass certain things which are not strictly speaking the subject of tenure and in which a man has a freehold interest; the antithesis is not between freeholds and leaseholds for years, but between things which are holden and things which are not; and Coke says that the latter may pass by the word 'tenements.'

Littleton says, s. 91, 'When a freeholder doeth fealty to his lord, he shall hold his right hand upon a book, and shall say thus: "Know ye this my lord, that I shall be faithful and true unto you, and faith to you shall bear for the lands which I hold of you, and that I shall lawfully do to you the customs and services which I ought to do, at the terms assigned, so help me God and the Saints;" and he shall kiss the book.'

It will be observed that fealty is to be done for 'the lands *which I hold* of you.' Coke in his commentary on the passage says, 'And yet some that are not tenants of any freehold shall do fealty, as a tenant for years shall do fealty. Bracton saith, *De nullo tenemento quod tenetur ad terminum, fit homagium fit tamen inde fidelitatis sacramentum.*' Littleton, s. 132, says, 'If a lease be made for a term of years, it is said, that the lessee shall do fealty to the lessor because he holdeth of him. And this is well proved by the words of the writ of waste, when the lessor hath cause to bring a writ of waste against him; which writ shall say that the lessee holds his tenements of the lessor for term of years. So the writ proves a tenure between them.'

It will be noted that in this section Littleton expressly applies the words 'hold,' 'tenure' and 'tenements' to a term of years.

Coke in his commentary on the words, '*Also if a lease be made for years the lessee shall do fealty,*' says, 'For there is also a tenure between them. And Littleton's opinion in this case is holden for good law at this day.'

Littleton says, s. 213, 'Rent service is, where the tenant holdeth his land of his lord by fealty and certain rent or by homage, fealty and certain rent, or by other services and certain rent;' s. 214, 'And if a man will give lands or tenements to another in the tail yielding to him certain rent by the year, he of common right may distrain for the rent behind, though that rent was made without deed because that such rent is rent service. In the same manner it is if a lease be made to a man for life, or the life of another, rendering to the lessor certain rent, or for term of years rendering rent;' and s. 215, 'But in such a case where a man upon such a gift or lease will reserve to him a rent service it behoveth that the reversion of the lands and tenements be in the donor or lessor;' and s. 216, 'And this is by force of the Statute *Quia emptores terrarum.*'

Again, the Statute of Gloucester, c. v, says, 'Ensement est purview, que home eit desormes briefe de Waste en le Chancery vers home que tient per le ley Dengleterre, ou en autre maner a term de vie, ou des ans, ou feme que tient en dower.'

It will be observed that not only does Littleton expressly apply the word 'tenements' to leaseholds for years, but Coke expressly says that there is a tenure between the lessee for years and the lessor, Littleton and the Statute of Gloucester speak of a tenant for years 'holding,' and, unless all these authorities are incorrect, leaseholds for years appear to be comprised in 'land of any tenure' and 'tenements.' H. W. E.

The Montana Cases.

These cases, recently decided by the Supreme Court of the United States, involved two serious questions; first, the right of ocean common carriers to exempt themselves from liability, by stipulation in the bill of

lading, for loss caused by negligence in the navigation of the vessel; secondly, the law which should govern the determination of that question in the case of a loss in English waters, of a vessel and cargo bound from Newport, Rhode Island, to Liverpool, in respect of goods shipped by a contract made in the United States, the vessel being English in point of fact, but the bill of lading containing no indication that the owners were English or that their principal place of business was in England rather than in the United States,—in a word the bill of lading containing no other indication of the intended governing law than the fact that the contract was made in the United States.

The Court, in an opinion delivered by Mr. Justice Gray, in which the whole ground is traversed, held that the carriers could not exempt themselves from liability for negligence, and that the contract was to be governed by the law of the United States. Some conflict of authority was admitted to exist in the American courts concerning the validity of stipulations of the kind; the Court of Appeals of New York itself, where the contract was made, agreeing with the English rule that the carrier may exempt himself from loss by negligence. But the Supreme Court of the United States re-affirmed the well-known rule of that Court, and applied it to the case, that the Federal Courts are not bound by the decisions of the State Courts in matters of general mercantile law, 'but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties in an action at law of which the Courts of the State have concurrent jurisdiction, and upon a contract made and to be performed within the State.'

Great consideration was given to the question whether the law of England should be applied; and the Court, upon this point, found itself, in the reasoning by which it reached its conclusion, in general accord with the English authorities, though a different result had been reached, while the case was on trial, by Mr. Justice Chitty. *In re Missouri Steamship Co.*, 58 L. T. 377. But the Court preferred the decision of Judge Brown in the District Court of the United States for the Southern District of New York, in *The Brantford City*, 29 Fed. Rep. 373.

The conclusion of the Court is so succinctly stated by Mr. Justice Gray that it may well be quoted. 'Each of the bills of lading,' said the learned Judge, 'is an American and not an English contract, and, so far as concerns the obligation to carry the goods in safety, is to be governed by the American law, and not by the law, municipal or maritime, of any other country. By our law, as declared by this court, the stipulation by which the appellant undertook to exempt itself from liability for the negligence of its servants is contrary to public policy and therefore void; and the loss of the goods was a breach of the contract, for which the shipper might maintain a suit against the carrier. This being so, the fact that the place where the vessel went ashore, in consequence of the negligence of the master and officers in the prosecution of the voyage, was upon the coast of Great Britain, is quite immaterial.' M. M. B.

Mr. Pike sends us the following reply to a 'Note' in the April number of this REVIEW on his article 'Feoffment and Livery of Incorporeal Hereditaments' which appeared in the January number:—

The author of the 'Note' begins by asking whether the writer of the article can 'be forgetful of the fact that whereas the proper legal expression for corporeal hereditaments was and is "*seised* in his demesne as of fee,"

the corresponding expression for incorporeal hereditaments is "*seised* as of fee and right." It is somewhat difficult to be forgetful of that which one never knew. The words 'in his demesne' were applicable to rent; the words 'of right' were applicable to corporeal hereditaments. There occurs in F. N. B. 1, as the form of a count on a Writ of Right in respect of a manor, the form 'seised as of fee and right;' and in Fitz. Abr. Tit. *Droyt*, 10, the same words are applied to an acre of land. The full form in a count on a Writ of Right relating to corporeal hereditaments was more commonly 'seised in his demesne as of fee and of right.' If rent was also included the form was the same; and if in the course of the pleadings it became necessary to refer to the rent alone, the expression still was 'seised in his demesne as of fee and of right.' There was therefore one kind of incorporeal hereditament (as incorporeal hereditaments are at present classed) of which it was correct to say 'seised in his demesne as of fee.' In Litt. sec. 10 also the expression is applied to rents, though on that section apparently Blackstone has founded the *dictum* as to the non-use of the words 'in demesne' in relation to incorporeal hereditaments in general. But even Blackstone did not say that the words 'of right' had any special application to things incorporeal. They have, in fact, always been applied equally to things corporeal and things incorporeal when the necessity to employ them arose. Whatever importance, therefore, the author of the Note may attach to the distinctions which he has drawn, they cannot in any way affect the propositions set forth in the article. There are other distinctions as to seisin which were duly considered before the article was written, but which it was not and is not necessary to mention for the purposes in view.

When the author of the Note says Co. Litt. 142 is cited in the article 'as showing that Coke recognised that one rent or service might issue out of another,' and adds 'the passage proves nothing of the kind,' it is not clear whether he is finding fault with Coke or with the article. Coke's words are 'by act of law one rent or service may issue out of another.' The words of the article are 'Coke also recognised the fact that in case of mesnalty, where there had been subinfeudation before the statute of *Quia emptores*, one rent or service might issue out of another.'

The words of the article are in strict accordance with the words of Coke, and it is abundantly evident from the context in Co. Litt. that he meant what he said. 'If *A* before the statute of *Quia emptores terrarum* had given lands to *B* to hold to him by fealty and ten shillings rent, and *B* had made a feoffment in fee to *C*, &c., whereby there was a mesnalty created; in this case *C* should hold of *B* either by the same services the law created, or such as he specially reserved, and *B* did by operation of law hold those services of *A* by fealty and ten shillings rent, that is to say by rent and service out of rent and service.' Thus if *B*, holding twenty acres of land of *A* by ten shillings rent, enfeoffed *C* of the same twenty acres to hold of him (*B*) by twenty shillings rent, the rent of ten shillings then issued out of the rent of twenty shillings, and *B* held of *A* the twenty shillings of rent by the rent of ten shillings.

This is not a point on which Coke could have been mistaken. He might (and he did sometimes) interpret the ancient law by the law of his own time. He might quote from a worse instead of a better authority, as when he cited from the Red Book of the Exchequer, as it existed in his day, an inexact copy made about the time of Henry VI instead of the contemporary record of the reign of Edward III. But as to rent issuing out of rent the law in his day was what it had long previously been, and, when the matter is thought out, is easily seen to have been as he stated it.

In relation to the statements in the article, for which there is ample warrant, that the nature of an advowson was, for a long period, not fully understood, and that livery of seisin of an advowson had been given by means of the door of the church, the writer of the Note, for some reason, calls attention to the translation of the words '*laici interest*,' which occur in a case cited. He says that 'of course' the true rendering is 'it was the province of the layman.' Some scholars may, perhaps, think that the Latin for 'it is the province of the layman' is '*laici est*;' some students of mediaeval history may, perhaps, see how it was supposed to be 'to the interest of' the layman, in fear as to his eternal welfare, to give as much as he could to the Church, and they will hardly agree with the opinion expressed by the writer of the Note that the translation given in the article is 'nonsense.' In any case the arguments in the article would not be affected.

With regard to feoffment of common, plainly mentioned in the Statute Westm. 2, c. 46, the author of the Note suggests an explanation which may be very ingenious, but which it is difficult to follow. He uses the expressions 'grant by feoffment' and 'tenancy and couchancy,' in which there must surely be one misprint at least.

The writer of the Note has remarked that 'Mr. Pike certainly confounds the seisin which is necessary to full ownership of a rent (=taking of esplees) with the livery of seisin which he thinks was at one time necessary for the completion of a grant of the rent. The necessity of taking of esplees in order to be seised was discussed in *Orme's case*, L. R., 8 C. P. 281.' This citing of *Orme's case* is doubly unfortunate.

(1) The necessity of taking esplees was not discussed in *Orme's case*. The point argued was whether a grant of rent-charge to *A*, *B*, and *C*, to hold to the use of the same *A*, *B*, and *C*, their heirs and assigns, fell within the operation of the Statute of Uses (so as to give the grantees the actual possession of the rent-charge on the execution of the indenture) or was at common law. It was not disputed that, if the grant was at common law, the case was governed by *Murray* v. *Thorniley* (2 C. B. 217; 15 L. J. (C. P.) 155). It is therefore to *Murray* v. *Thorniley* and not to *Orme's case*, that we must look for the principles involved.

(2) *Murray* v. *Thorniley*, so far from supporting the position of the writer of the Note, is directly adverse to it, and is a remarkable illustration of the statements made in the article. The Court held that the possession in fact of a rent-charge must be the actual manual receipt of the rent itself or some part of it, *or of something in lieu of it*. They decided that there was not actual possession in the particular case at a particular time because the first payment of the rent had not then become due, and because '*nothing whatever took place but the mere execution of the deed*.' The decision was not given simply because there had been no actual receipt of rent, but because there was not such actual possession as would have been sufficient to ground an assize. It was not denied that such possession might be gained otherwise than by actual receipt of the rent. Even the counsel who was arguing against the actual possession in the particular case accepted and cited the following passage in Gilbert on Rents:—'If a penny had been *given by way of seisin* of the rent, that had been sufficient to ground an assize, because here the grantee is *put into possession of the rent by the tenant himself*.' This would have been, to all intents and purposes, livery of seisin by the hand of the very tenant of the grantor, by whose hand the grantor had been seised of the rent. The penny or any other sum or thing so delivered could not in any way fall under the head of 'esplees,' was not a part of the first or any other payment of rent, and would not have been deducted from any such

payment. Moreover, the Court actually cited as good law Litt. sec. 235—the very section cited in relation to this subject in the article which the author of the Note impugns because of the decision in *Orme's case*.

It is, no doubt, right that opinions so much at variance with some received doctrines as those expressed in the article should be subjected to the test of criticism; and the author of the Note is to be thanked for having pointed out the parts which he considers the weakest. The whole of the arguments, however, which he has advanced in his desire to arrive at the truth have now, it may be hoped, been fully answered.

[Our correspondent's first point was that there is nothing conclusive in the old use of the word 'seised' in reference to incorporeal hereditaments, because even in modern times, where the distinction was undoubtedly well established that they lay in grant and not in livery, there was no difficulty in continuing this use of the word 'seised.' It is apparently conceded by Mr. Pike that Blackstone does so use the word. For the particular expression 'seised as of fee and right' cf. Co. Litt. 17 *b*.

With regard to the citation from Co. Litt. 142 it can hardly be said to *prove* that one rent or service may issue out of another, or that Coke thought so, in the face of Co. Litt. 47 *a*: 'A rent cannot be reserved by any common person out of any incorporeal inheritance, as advowsons, commons, offices, corodie, mulcture of a mill, tythes, fairs, markets, liberties, privileges, franchises, and the like. . . . A reversion or a remainder of lands or tenements may be granted reserving a rent, for the apparent possibility that it may come in possession.' The case supposed in Co. Litt. 142 is of subinfeudation before *Quia Emptores*, whereby a reversion would be reserved.]

Cohen v. *Kittell*, 22 Q. B. D. 680, closes the line of 'wagering cases' whereof *Read* v. *Anderson*, 13 Q. B. Div. 779, is the chief. It is now possible to sum up approximately the results of judicial legislation with regard to a wager made through an agent. They are noteworthy:—

1. A wager is in no sense in itself an unlawful contract. The trade of a betting agent is not therefore, as suggested by the Master of the Rolls, a business of which the law will take no notice. *Read* v. *Anderson*, 13 Q. B. D. (C. A.) 779, and especially the judgment of Lord Justice Bowen, *ibid.* 782, compared with the language of the Master of the Rolls, *ibid.* 781, 782.

2. A betting agent employed to make a bet in his own name, on behalf of his employer, may have authority to pay the bet if lost, and when the bet is made this authority may become irrevocable. The agent's trade—to put the same thing somewhat differently—is a lawful profession, and if the agent through the act of his principal has been induced to bind himself by contracts which, though not legally enforceable, could not be broken without damage to the agent's professional prospects, the agent has a right to perform such contracts at the expense of his principal. (*Read* v. *Anderson*.)

3. If an agent is employed by a principal for a commission, to make bets for the principal, and receives the winnings, he is bound to pay them over to the principal, and the principal may, if the agent does not pay them over, recover the amount in an action (*Bridger* v. *Savage*, 15 Q. B. Div. 363).

4. If a principal employs an agent to bet on commission, and the agent fails to make certain bets pursuant to the principal's instructions, the principal cannot maintain an action against the agent for breach of contract and recover as damages the gains which the principal would have made if the agent had carried out his instructions (*Cohen* v. *Kittell*, 22 Q. B. D. 680).

The rules to be deduced from the cases may not be strictly incon-

sistent with each other. But the spirit in which 8 & 9 Vict. c. 109, s. 18, is interpreted by the judges who gave judgment in *Cohen* v. *Kittell*, is different from the spirit in which the same enactment was interpreted by the majority of the Court of Appeal in deciding *Read* v. *Anderson*. Baron Huddleston and Mr. Justice Manisty, if they had occupied seats in the Court of Appeal, would have agreed with the Master of the Rolls, rather than with Lords Justices Bowen and Fry.

This divergence of judicial sentiment suggests an important enquiry. Have not the Courts unintentionally nullified the effect of 8 & 9 Vict. c. 109, s. 18? Any layman would suppose that the object of that enactment was to make all contracts connected with wagers void and legally unenforceable, and thus free the Courts from the necessity of deciding upon claims arising from a class of business which, if not illegal, is disapproved of by public morality, and a layman would in this matter come to a sound conclusion. The aim of the legislature has, it is clear, not been attained. If the object be worth attainment Parliament must correct the error of the Court. Meanwhile legal theorists will await with interest the decision of the Court of Appeal on *Cohen* v. *Kittell*.

In re Grove, 40 Ch. Div. 216, is important in more ways than one.

First. It all but determines a very difficult point in the rules governing the so-called conflict of laws. We may now lay down with something like certainty that a child born before the marriage of its parents cannot in the opinion of English Courts be legitimated by the subsequent intermarriage of its parents unless the father is *both* at the time of the child's birth *and* at the time of the marriage domiciled in a country whose laws allow of *legitimatio per subsequens matrimonium*. Hence if *A* is born in Scotland before the marriage of his parents, who are domiciled in Scotland, and after acquiring an English domicil, intermarry in England, *A* is not legitimated by the marriage.

Secondly. *In re Grove* does not absolutely decide the point for which it will no doubt be cited henceforth as an authority, both because the case may be carried to the House of Lords, and because, on one view of the facts, the case might have been determined as it was without determining the effect of the parents acquiring an English domicil after the birth of their child, and before their marriage. The decision, however, which is probably right, is in strict conformity with the rule laid down by Mr. Westlake (*Private International Law*, (edition of 1880,) pp. 84, 85), though opposed to the interpretation of the law given by Mr. Dicey (See Dicey, *Law of Domicil*, Rule 35).

Thirdly. The case exemplifies the one great defect of the law of domicil as it exists in England, namely, its tendency to make rights depend upon facts which are in reality hardly ascertainable. In 1888 the validity, or invalidity, of a claim to property is found to depend on determining whether a Genevese who came to England in 1734 had or had not in 1755 made up his mind to reside permanently in England.

The decision in this case is, considering the differences between the marriage law of Scotland and of England, at least as important as the passing of most statutes. But though it was given in the Court below on the 1st of November, 1887, and by the Court of Appeal on the 7th of August 1888, a report of it does not appear in the *Law Reports* until March, 1889.

Chisholm v. *Doulton*, 22 Q. B. D. 736, determines that a manufacturer who owns premises which come within the provisions of the Smoke Nuisance

(Metropolis) Act, 1853 (16 & 17 Vict. c. 128), ss. 1, 2, and whose furnaces do not in matter of fact consume their own smoke, though they would consume it if carefully used, is not criminally responsible for the negligence of his servant, and therefore cannot be convicted of any offence under these sections. This is one of the decisions which are logically defensible, but which threaten to curtail the operation of a statute meant to protect the public. The question which suggests itself to a critic is whether proceedings for fines ought to be treated as strictly criminal in the sense that they cannot be maintained against any man who has not the *mens rea*.

Nutton v. *Wilson*, 22 Q. B. Div. 744, is a warning to all members of public bodies that they must construe with the utmost strictness statutory provisions forbidding them from being concerned in contracts with the body, e.g. a local board to which they belong. The strictness of the courts in this matter is pre-eminently salutary and can hardly be carried too far.

Tomkins v. *Jones*, 22 Q. B. Div. 599, is worth a moment's notice. *X* disputes *A*'s title to a house held by *A* under a lease for years. *X* also meets an action in the County Court by the defence that under the County Courts Act, 1888, a County Court has no cognizance of any action 'in which the title to any corporeal or incorporeal hereditaments shall be in question.' *A* objects on the ground that the title to a 'hereditament' cannot be in question, because a leasehold interest in land does not descend to a man's heirs. The Court decide in favour of *X* on the ground that the word 'hereditament,' as used in the County Courts Act, 1888, s. 56, is 'not used as describing the quantum of interest in the subject-matter, but as describing the subject-matter itself, namely the land.' These words from Lord Justice Bowen's judgment give, we have little doubt, a right interpretation to the statute. But the difficulty rather disposed of than really solved by the Court lies, it will be found, very deep in the defects of English legal terminology. Our lawyers when dividing property have never been able to avoid confusions which arise from the basing of their divisions, sometimes upon the nature of the thing or object, e.g. land, in which a person has rights, and sometimes upon the nature of the rights which a given person possesses in the thing or object, e.g. on the difference between leasehold and freehold interest in land.

The energy of the Inland Revenue Office, combined with what Sir Archibald Allison used to call 'the vulgar impatience of taxation,' is rapidly creating a large body of income tax law. *The Clerical, Medical, &c. Life Assurance Society* v. *Carter*, 22 Q. B. Div. 444, establishes what to any one who reads carefully 16 & 17 Vict. c. 34, ss. 1, 2, seems hardly to require decision that interest from investments is taxed as such under Schedule D. *Bray* v. *The Justices of Lancashire*, 22 Q. B. Div. 484, determines that such parts of a county lunatic asylum as are in the occupation of officers having an income of more than £150 per annum are assessable to income tax under Schedule A, and thus places a check on the tendency prevalent among owners of property used for public purposes to claim for it exemptions which apply only to property in the occupation of the Crown. A great deal of useless litigation would be saved if taxpayers would remember that the aim of a taxing Act is to impose a tax, and not to exempt citizens from taxation.

Isitt v. *The Railway Passengers Assurance Co.*, 22 Q. B. Div. 504, illus-

trates the fact to which we have often called attention, that the practical perplexities of the Courts are nothing else than the theoretical puzzles of logicians embodied in the facts of actual life. *A* insures himself against 'death from the effects of injury caused by accident.' He falls and dislocates his shoulder. He takes to his bed, and dies within a month from the date of the accident. The immediate occasion of his death is pneumonia caused by cold. But he would not have died when and as he did, had he not been weakened by the fall and been thereby made unusually susceptible to cold. The accident is, so to speak, the cause of the cause of *A*'s death. Can he be fairly said to have died from the effects of injury caused by accident? This is the puzzle presented for the decision of Baron Huddleston and Mr. Justice Wills. They decided, rightly we think, that *A*'s death was one of the effects of injury caused by accident. But two equally sensible judges might have taken the contrary view. What students should notice is, that this uncertainty does not arise from any defect of the law or from any perversity of the legal or judicial mind, but from the difficulty well known to logicians of determining what are the conditions which are rightly included within the term 'cause.' Legal decisions are at bottom simply applied logic.

The decision of Butt J. in *The Moorcock* (13 P. Div. 157) has been affirmed on appeal (14 P. Div. 64), on the ground, not distinctly brought out in the Court below, that the state of the bed of the river adjoining the defendants' wharf could be easily ascertained by the defendants and could not be ascertained with reasonable facility by the plaintiffs. It was therefore held that the defendants were bound to use reasonable care—not to make the place safe for a ship to lie at, which they had no power to do, but to know whether it was safe or not. Even so Lord Esher thought that the decision was a step in advance of existing authorities.

Concha v. *Murrieta*, 40 Ch. Div. 543, is one illustration among many of the activity with which the rules of so-called private international law are being developed by judicial legislation which is kept in constant activity through the complication of modern business transactions and of modern social life. In this case the English Courts were called upon to deal with a fraud alleged to have been committed by a Peruvian citizen in 1855, and were compelled to consider, and in effect to determine, the law of Peru in regard to paternal authority and to the respective rights of a widower in the property of his deceased wife, and of a daughter in the property of her deceased mother. The case moreover was complicated by the fact that after the commission of the fraud the father died, and the action was brought against his representative. Two points of some importance were determined; first, that the rule '*actio personalis moritur cum persona*' does not apply where an action is brought against the representatives of the deceased for a fraud committed by him in a fiduciary relation, if at any rate his estate gains by the fraud; secondly, that though foreign law is a matter of fact to be determined by our Courts on the evidence of foreign advocates, yet if the latter refer to the Code of their country, our Courts may interpret the passages of the Code which are referred to.

Dying declarations are an exception to the general rule against hearsay on the assumption that a man, as it has been said, will not 'go into the presence of his Maker with a lie on his lips,' but to render them admissible

there must, as Lush J. said in *Reg.* v. *Osman* (15 Cox, C. C. 1), be a 'settled hopeless expectation of immediate death,' or as Willes J. more correctly stated in *Reg.* v. *Peel*, 2 F. & F. 21, a 'settled hopeless expectation of death;' for death need not be immediate, but only impending. It is the belief which is deemed to be a guarantee of truth-telling. It is not easy to improve on definitions by Willes J. or Lush J., and Charles J. cannot be said to have made the matter much plainer by saying that the 'declarant must have an unqualified belief in the nearness of death, a belief, without hope, that he or she was about to die' (*Reg.* v. *Gloster*, 16 Cox, C. C. 471). The difficulty is in applying the rule, and doing so devolves a heavy responsibility on judges. While there is life there is hope is a well-established adage, and on the strength of it a patient will often display a most illogical, not to say unconcionable hopefulness. What is a judge to do with a dying declaration coupled with words like these, 'I hope I shall get well, but do not think so'? Charles J. very rightly excluded it.

As might be expected, *Mills* v. *Armstrong* (13 App. Cas. 1, *The Bernina*) has led to some difficulty in applying the law as laid down by the House of Lords. In *Mathews* v. *London Street Tramways Co.* (58 L. J. Q. B. 12), an omnibus driver, to avoid an obstruction, pulled on to a tramway line and was run into by the tramcar before he could get clear, whereby a passenger on the top of the omnibus was thrown off and injured. He brought an action against the tram company, and the judge told the jury that to find a verdict for the plaintiff they must be satisfied that the accident occurred solely through the negligence of the tram company's servants. This was wrong. The proper direction (as the Divisional Court pointed out) would have been, 'Was there negligence on the part of the tramcar driver which caused the accident?' The passenger, if both vehicles are to blame, has two distinct remedies, his action, in contract or tort at his election, against his own conveyance, and his action in tort against the other vehicle. He is not concerned with their rights or remedies *inter se*.

Herodotus tells us of a tribe of people whose religion it was to eat their deceased parents, and who when they were told that the Greeks burnt theirs, cried out at so horrid an act of impiety and bade the speaker be silent, on which the father of history does not fail to observe how various are the opinions of men even on the commonest subject. A similar variety of moral sentiment seems to exist with regard to the 'dishorning' of cattle. In Scotland the Court of Session refused to convict for the practice (*Renton* v. *Wilson*, 15 Court Sess. Cas., Court of Just. 4th S. 84). In Ireland the Court of Exchequer held that dishorning was within the statute (12 & 13 Vict. c. 92, s. 2), *Brady* v. *M'Ardle*, 15 Cox, C. C. 516; but a year afterwards a Court of co-ordinate jurisdiction declined to follow this decision, *Callaghan* v. *Society for Prevention of Cruelty to Animals* (16 Cox, C. C. 101). Lord Coleridge has now flung the sword of justice into the scale against the practice (*Ford* v. *Wiley*, 5 Times R. 483). Pain may be 'necessary,' and if proportioned to the result is not cruelty; but the Court was clear that pain inflicted for profit, fashion, or convenience was not necessary, and therefore not justifiable. This materially modifies the dangerous dictum of Cleasby B. in *Murphy* v. *Manning* (2 Ex. D. 307) that the statute does not apply if the purpose of the act is to render the animal 'more serviceable for the use of man,' a dictum which gives a specious license to self-interest to perpetrate worse things than cutting

cocks' combs, nicking swans, or spaying sows. In these cases there is no conflict between humanity and science, but only between humanity and sordid cupidity or criminal callousness. *Ford* v. *Wiley* is 'no sentimentalism, but plain common sense.'

Fire Insurance offices have to protect themselves against a great deal of knavery, and to do so it has become common to insert in fire policies a clause empowering the offices to terminate the policy by notice, refunding a rateable proportion of the premium. Such a policy came in question in *Sun Fire Office* v. *Hart* (14 App. Cas. 98), the words being, 'if by reason of such change (i. e. removal, &c.) or from any other cause whatever' they should desire to do so. The Privy Council held on the construction of this clause that it gave the insurers power to terminate at will. This is a valuable decision for the offices; it meets the common case where incendiarism is more than suspected but cannot be proved. The office can at once relieve itself from any further liability without making itself unpopular by resisting claims.

It would perhaps be well if the givers of wedding presents made it plain at the time to which of the happy pair the presents should belong, ungracious as it may seem when the matrimonial bark is spreading its sails to forebode breakers ahead in the shape of an execution creditor (*Re Jamieson, Ex parte Pannell*, 37 W. R. 464). If the gift is a diamond necklace or a set of razors the intention is easily inferrible, but mostly presents are given to the joint establishment without distinction of persons and no very definite intention. The simple logic of the old law transferred them to the husband, but the venerable doctrine of unity having been much encroached upon, not to say exploded, husband and wife are now presumably co-owners in respect of presents so given. Separate property is indeed so far now the normal state of things that the Court in granting probate of a married woman's will will presume her possession of separate property (*Harding* v. *Sutton*, 59 L. T. R. 838). Separate property is however no safeguard against marital influence, less even than the separate examination. The only real safeguard is the restraint on anticipation. Even this is now removable under s. 30 of the Conveyancing Act, 1881. It is satisfactory therefore to find the Court of Appeal in *Re Little, Harrison* v. *H.* (40 Ch. Div. 418) declaring that the power given to the Court by the section is to be exercised with 'extreme caution.' A lax interpretation of the section, already visible in some of the cases (*Re C.'s Settlement*, 56 L. J. Ch. 558; *Re Currey*, 56 L. J. Ch. 389), would seriously impair the value of the restraint. *Re Little* was just an example of how the section might be abused.

An infant's liability for necessaries is sometimes treated as if it were an exception to the paternal protection which the state extends peculiarly to those who by reason of their want of understanding are incapable of taking care of themselves. In truth it is only an exemplification of it. If the infant could not bind himself he might starve in the midst of wealth. *Rhodes* v. *Swithenbank* (22 Q. B. Div. 577) is an instance how entirely the benefit of the infant is the supreme consideration. A power to compromise an action is as a rule incident to the authority to conduct the cause (*Re West Devon Gt. Consols Mine*, 38 Ch. Div. 51), but this rule must bend in the case of a next friend; he cannot, to save his own costs, surrender by a compromise the infant's right of appeal. The same principle applies to a lunatic. An action may be brought against him for necessaries in the shape

of a medical examination for the inquisition (*Brockwell* v. *Bullock*, 22 Q. B. Div. 567). The paternal jurisdiction however is confined, as is pointed out in *Bray* v. *JJ. of Lancashire* (22 Q. B. Div. 491), to the protection, or control if necessary, of lunatics. It does not extend to their maintenance any more than to the maintenance of infants. That is the duty of parents, parishes, or counties. Hence a lunatic asylum is not entitled to exemption from poor rates as being used for Crown purposes.

Is it fraudulent to state in a prospectus that the company's capital has been 'subscribed' when it has only been subscribed in the sense of fully-paid-up shares having been allotted to the vendor? Kekewich J. thought so in *Arnison* v. *Smith* (41 Ch. Div. 98), and rightly. Taken literally the statement may be true, but it contradicts the common understanding, and so is misleading. 'Subscribed' in a prospectus means, and is intended to mean, that the shares have been taken up by the general public, otherwise it would be no inducement to apply.

Kay J. is always laudably anxious to keep down costs (and no costs require to be more carefully watched than those of winding up petitions); but in *Re Criterion Gold Mining Co.* (41 Ch. D. 146) the learned Judge seems to have been combating a spectre. North J. in *Re Paper Bottle Co.* (40 Ch. D. 52) did not lay down any rule that where a petition is withdrawn, all parties, whether shareholders or creditors, and whether appearing to support or oppose, are entitled to their costs. The rule was that the petitioner in such a case must pay creditors or shareholders appearing to support or oppose *one set of costs each*. The rule moreover is not 'a hard and fast one,' but a general rule, i.e. subject to discretion. It is no anomaly that a withdrawing petitioner should be in a worse position than a petitioner whose petition has been dismissed. He ought to be. He has brought the parties there, and by his conduct in withdrawing has made it impossible for the Court to say that they were not all of them right in appearing.

Bigamy under the circumstances in *Reg.* v. *Tolson* (5 Times R. 465) involves no moral guilt, and as such the Court ought not, unless compelled, to brand it as a crime. The Act provides that a wife marrying again is not to be guilty of bigamy if her husband has been continuously absent for seven years then past and she has not known of his being alive within that time. There is nothing said about reasonable belief of death as a defence. Does this silence by implication exclude the defence? Surely not, and so the Court for Crown Cases Reserved has decided. A good common law defence to a criminal charge ought not to be taken away unless by express words or necessary implication. In *Reg.* v. *Prince* (L. R. 2 C. C. R. 154) there was reasonable belief as to the girl's being over age, but then abduction is an unlawful act which a person commits at his peril. Marrying again is not in itself an unlawful act. This differentiated the two cases.

A person who carries on an exceptionally delicate trade, e. g. storing brown paper which requires a particular temperature, cannot complain of his neighbour using his premises in a lawful way, though his so using them has an injurious effect on his trade, any more than a person with a delicate nervous organization can complain of his neighbour giving a juvenile party (*Robinson* v. *Kilvert*, 41 Ch. Div. 88). To allow such a complaint would alter the whole theory of our English law of nuisance. It makes no difference that the trader's neighbour is also his landlord. The landlord cannot

do anything whereby he makes the premises unfit for the purpose for which he knows they are wanted, because this would be a breach of the covenant for quiet possession. But that is all. If the tenant-trader wants extraordinary protection he must bargain for a restrictive covenant.

The question what are 'minerals' under a statutory or ordinary reservation is of course a question of construction. *Prima facie* they include (or were thought till *Lord Provost of Glasgow* v. *Farie*, 13 App. Cas. 657, to include) every substance which can be got from underneath the surface of the earth for the purpose of profit (in the sense of having a use and value of its own independent of its being a constituent of the soil), (*Hext* v. *Gill*, 7 Ch. 712). Now it appears that clay is not a 'mineral' within the Waterworks Clauses Act 1847, and consequently not within the corresponding sections of the Scotch Railways Clauses Act 1845 and the English Railways Clauses Act 1845 (*Lord Provost of Glasgow* v. *Farie*). This decision proceeds on a refined distinction between 'mines of minerals' and 'mines and minerals'; in other words, minerals are made to depend on whether they are got by underground excavations or open workings, a conclusion which Lord Watson and Lord Herschell both disclaimed, and which would hardly commend itself to common-sense were it not that the Legislature must now be taken to have said so. Open workings more obviously interfere with railway or waterworks' undertakings than underground excavations, but not more really. One breaks up the surface, the other lets it down If the undertakers want more than the Act gives them as part of their purchase for their own protection they must buy (*Bennett* v. *Great Western Railway Co.*, L. R. 2 H. L. 27). Lord Macnaghten's view that to reserve clay might lead to *mala fide* claims is hardly a reason for confiscating the seller's property. In *Earl of Jersey* v. *Neath Poor Law Union* (22 Q. B. Div. 555) the Court of Appeal take the optimist view that *Lord Provost of Glasgow* v. *Farie* has not affected *Hext* v. *Gill*, and reaffirm their faith in that authority. Perhaps not, but it has introduced a most unfortunate element of uncertainty into the whole subject.

The great elevation of buildings necessitated by the crowded condition of our cities has recently raised many questions of light, and among them what is the meaning of 'actually enjoyed' for twenty years in s. 3 of the Prescription Act. Light may be 'actually enjoyed' by the windows of an unfinished, uninhabited house (*Courtauld* v. *Legh*, L. R. 4 Ex. 126). It may be 'actually enjoyed' without a continuous user. The words mean, according to Kay J. (*Cooper* v. *Straker*, 40 Ch. D. 21), 'having had the amenity or advantage of using' the access of light. Thus a person who has moveable iron shutters to his windows and keeps them closed all but a few days in the year has 'actually enjoyed' the 'access and use' of light, because he can open them when he likes. It is his way of enjoying. A cessation of user may be fatal, but only if it is such as to exclude the inference of actual enjoyment as of right (*Hollins* v. *Verney*, 13 Q. B. Div. 304). In *Presland* v. *Bingham* (37 W. R. 385) the question was one of interruption of light. The owner of the servient tenement had piled boxes against the window, but the evidence showed that the interruption caused by such boxes was not continuous, but merely a casual, temporary, and intermittent obstruction. If the obstruction is of a permanent kind, the onus is on the person claiming the access of light to show that the interruption has not lasted for a year.

By the time a case has reached the House of Lords the issues are defined and the arguments matured in a way which tends much to simplify it. This was so with *Spicer* v. *Martin* (14 App. Cas. 12), where a sub-lessee of one of a block of houses in Cromwell Road (part of a building estate) brought an action for an injunction to restrain his lessor and the other sub-lessees from using adjoining houses as an hotel in contravention of a restrictive covenant. The Court of Appeal had recourse to representations of a dubious kind by the lessor, which it spelt out of letters and construed as amounting to a collateral contract by him as to the future management of the estate, when the simple solution of the matter was an application of the doctrine in *Renals* v. *Cowlishaw* (2 Ch. D. 125; 11 Ch. Div. 866) and *Nottingham Brick and Tile Co.* v. *Butler* (15 Q. B. D. 261; 16 Q. B. Div. 778). The principle of these cases is, that if a person selling plots of land, part of a larger property, e. g. a building estate, exacts from each of the purchasers restrictive covenants, and the restrictive covenants are intended for the common advantage of the purchasers of their plots, the purchasers and the assigns may enforce them *inter se* for their own benefit. 'Community of interest,' as Lord Macnaghten observed, 'necessarily requires and imports reciprocity of obligation.' The whole property not being sold at the same time will not displace the inference of intention if the vendor was desirous of selling (*Collins* v. *Castle*, 36 Ch. D. 243). It is different if an allotment is subdivided. Then the owner of one subdivision cannot enforce the restrictive covenants against the owner of the other for any act which does not infringe the rights of other allottees (*King* v. *Dickeson*, 40 Ch. D. 596). The present activity of the 'demon' builder in laying out building estates makes well-defined principles as to tenants' mutual rights and obligations very necessary.

The position of an executor carrying on his testator's business under an authority ought by this time to be well understood. It is clear from *Re Gorton* (40 Ch. Div. 536) that it is not, or the executor's creditors would not have claimed to prove in competition with the creditors of the testator. A testator cannot prejudice his creditors by directing his executor to carry on his business with assets which belong to them. All he can dedicate to the carrying on of the business is any surplus after they are paid. If this surplus fructifies in the executor's hands, the executor's creditors may claim against it and its accretions in priority to the testator's creditors, because they stand in the shoes of the executor to the extent, but only to the extent, of his right of indemnity against the estate. *Apropos* of executors, it is not easy to see why the executor of a judgment creditor should be entitled to serve a bankruptcy notice (*Re Woodall*, 13 Q. B. Div. 479), and the trustee in bankruptcy of a judgment creditor should not (*Re Goldring, Ex parte Harper*, 22 Q. B. Div. 87). There are good reasons why an assignee of a judgment debt by act of the party should not (*Ex parte Blanchett, Re Keeling*, 17 Q. B. Div. 303), for he might use it maliciously. An assignee by operation of law, like a trustee in bankruptcy or liquidator, is in a different position. No sound distinction, at all events, can be drawn between him and an executor. Either both or neither are within the Bankruptcy Act 1883, s. 4, subs. 1. (g).

The Court of Appeal, like the elephant's trunk, is capable of anything, from tearing up a tree to picking up a pin. In *Trade Auxiliary Co.* v. *Middlesborough Tradesmen's Association* (40 Ch. Div. 425) the Court seems to

have been engaged in the latter operation. It would be a surprising thing if three newspaper proprietors could not club together to employ a person to write an article on the terms of s. 18 of the Copyright Act, 1842, whether the employé is a war correspondent or a compiler of bills of sale lists; and if they do so it would be equally surprising if they could not sue for a piracy. The point pressed was that there must in such a case be a joint registration of copyright. This is erroneous. What is registered is the newspaper or book, not the copyright. Therefore, if each of the three newspaper proprietors registers his own paper, this enables them to sue for infringement of the joint copyright. Neither is it necessary before suing that the newspaper proprietor should have registered under the Newspaper Libel and Registration Act, 1881 (*Cate* v. *Devon Newspaper Co.*, 40 Ch. D. 500). There was a splendid audacity in contending, as was done in the latter case, that there is no copyright in a newspaper.

We need not forbode a return to the days when judges as creatures of the King fined juries for bringing in a verdict against the direction of the Court, because Sir P. Edlin, on a charge of malicious wounding, told the acquitting jury to reconsider the meaning of 'maliciously.' 'A judge,' as Pollock C.B. said in *Reg.* v. *Meany* (1 L. & C. C. C. 216), 'has a right, and sometimes it is his bounden duty whether in a civil or in a criminal cause, to tell the jury to reconsider the verdict,' but he goes on to use words which clearly imply that if the jury insist on his receiving their verdict he is bound to do so. Mr. Tulliver in the 'Mill on the Floss' regarded law as a cock-fight, in which it was the business of injured honesty to get a game bird with the best pluck and the strongest spurs. This is the popular view of jury cases, and not wholly devoid of truth. Juries require the experience of judges, not only to explain the law but to protect them against the arts of advocacy. There is much more danger of a jury being beguiled by the professional verdict-winner than intimidated by the judge.

In December, 1887, *à propos* of some papers connected with the succession of a private person, which had been deposited at the French consulate at Florence, a petty magistrate, under an order of Court, broke open the door of a room containing the Consular Archives, made a search for the documents, and affixed the judicial seals to the papers in question. This was done in spite of the protests of those in charge of the consulate, and a great commotion among the consuls ensued. The French consul in particular thought his archives inviolable, seeing that the Treaty of 1862 between France and Italy had provided that 'the local authorities under no pretext and in no case can search or seize papers forming part' of the Consular archives. This text however was found on examination not to be sufficiently explicit, and a supplementary treaty on the subject, concluded on the 8th December, 1888, and promulgated on the 7th February last (published in the current No. (III–IV) of M. Clunet's *Journal du droit international privé*) provides as follows:—

'Art. 1. Les mots "archives consulaires" s'appliquent exclusivement à l'ensemble des pièces de chancellerie et autres se rattachant directement au service, ainsi qu'au local spécialement affecté au dépôt de ces pièces.

'Art. 2. Il est expressément interdit aux consuls généraux, consuls, vice-consuls et agents consulaires de placarder dans le local affecté aux archives des documents et objets qui n'auraient pas ce caractère.

'Les chambres ou la chambre constituant ce local devront être parfaite-

ment distinctes des pièces servant à l'habitation particulière du consul et ne pourront être affectées à d'autres usages.

'Art. 3. Les instructions les plus formelles seront adressées par les deux gouvernements à leurs agents respectifs, en vue de leur prescrire de se conformer strictement aux dispositions énoncées à l'article précédent. Si un consul général, un consul, un vice-consul, ou un agent consulaire, requis par l'autorité judiciaire locale d'avoir à se dessaisir de documents qu'il détient, se refuse à les livrer, l'autorité judiciaire recourra, par l'intermédiaire du ministère des affaires étrangères, à l'ambassade dont cet agent dépend.'

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